163 U.S. 632

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 986.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 1, 1896.

(16,276.)

(16,276.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 986.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	2	1
Arraignment and plea	5	2
Similiter and calling of jury	6	2
Verdict	7	3
Motion in arrest of judgment	8	3
Motion for new trial	9	4
Judgment and sentences	17	7
Bill of exceptions	20	8
Evidence for the Government	20	8
Testimony of Arthur V. Hazlett	21	8
Frederick C. Lee	22	9
Joel Ridgway	24	10
Albanus Falkenberg	24	10
Clarence Crammer	24	11
Carl Arnston	25	11
Oscar Svensen	30	14
Ludwig G. Jensen	34	16
Emil Frederickson	38	19
H. C. B. Murray	42	21
Jabez Bowen	43	22
Ludwig Jansen (recalled)	44	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 1, 1896.

	Original.	Print.
Evidence for the defendants	44	22
Testimony of Charles Vitholm	44	22
G. A. Machold	46	23
Edward W. Paxis	46	24
Herbert P. Ker	47	24
Frederick Svanoe	48	25
J. H. S. Wiborg	48	25
Defendants' points	63	34
Charge of the court	68	36
Defendants' exceptions to charge	78	41
Judge's certificate to bill of exceptions	79	42
Assignment of errors	80	42
Petition for writ of error	89	47
Order allowing writ of error, granting a supersedeas, and directing that defendants be admitted to bail	93	50
Bond on writ of error	94	50
Order admitting Wiborg to bail	96	51
Order admitting Peterson to bail	98	52
Order admitting Johansen to bail	100	53
Recognizance of Wiborg	102	53
Recognizance of Peterson	103	54
Recognizance of Johansen	104	54
Clerk's certificate	105	55
Citation	106	55
Acceptance of service of citation	106½	55
Writ of error	107	56

1 In the District Court of the United States for the Eastern District of Pennsylvania.

Pleas before the honorable the judge of the said court.

It is thus contained:

THE UNITED STATES OF AMERICA
vs.
J. H. S. WIBORG, JENS P. PETERSON, and HANS JOHANSEN.
} Of February Sessions, 1896. No. 29. Indictment.

Be it remembered that at a district court of the United States in and for the eastern district of Pennsylvania, holden at Philadelphia, on the twenty-fourth day of February, A. D. 1896, before the Honorable William Butler, judge of said court, by the oaths of David K. Appenyeller, Daniel W. Cassell, Philip M. Dollard, Calvin Hamilton, Nathaniel B. Keely, Wm. G. Mayburry, Thomas T. Ochs, Allen Rutherford, and Albert Ulrich and by the affirmations of John R. Banes, William Breinig, Isaac R. Childs, Samuel
2 Diemer, Samuel Dutcher, George S. Hutton, William McAdoo, James McGalvey, Bennerville C. Painter, Willoughby H. Reed, John M. Smith, Edwin Tomlinson, John G. Umberger, and George A. Zacharias, good and lawful men of the said district, then and there empaneled and sworn or affirmed and charged to inquire for the said United States and for the body of the said district—

It is presented as follows:

In the District Court of the United States for the Eastern District of Pennsylvania, February Sessions, 1896. No. 29.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations do present that heretofore, to wit, upon the fourteenth day of February, in the year of our Lord one thousand eight hundred and ninety-six, J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, late of the district aforesaid, mariners, at the district aforesaid and within the jurisdiction of this court,
3 did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in

such case made and provided and against the peace and dignity of the United States of America.

ELLERY P. INGHAM,
U. S. Attorney.

17 February, 1896.

4 (Endorsed:) No. 29. Feb'y sessions, 1896. District court United States, eastern district of Pennsylvania. The United States of America *vs.* J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen. True bill. Isaac R. Childs, foreman. Indictment, beginning, &c., a certain military expedition, &c. Filed Feb'y 24, 1896. Witnesses: Carl Arnsen, Amel Frederickson.

5 Whereupon Alexander P. Colesberry, Esquire, the marshal of the said district, is commanded that he apprehend and take the bodies of the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen to answer the premises; which said indictment the said the Honorable William Butler, judge of the said the district court of the United States of America for the eastern district of Pennsylvania, afterwards, to wit, at the February sessions of the said the district court of the United States, held at Philadelphia as aforesaid, on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and ninety-six, did deliver here in court of record in form of law to be determined; and thereupon, at the February sessions of the district court of the United States for the eastern district of Pennsylvania, held as aforesaid, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-six, before the said the Honorable William Butler, judge as aforesaid, come the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, appearing at the bar of the court in their proper persons, who are committed to the said marshal, and they, the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, concering the premises in
6 the said indictment above specified and charged on them as above, being asked in what manner they would be acquitted thereof, severally say that they are not guilty thereof, and hereupon for good or ill they put themselves upon the country, and Ellery P. Ingham, Esquire, attorney of the United States of America for the eastern district of Pennsylvania, in this behalf does the like. Therefore let a jury immediately come before the said the Honorable William Butler, the said judge above named here, by whom the truth of the matter will be better known and who have no affinity to the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, to recognize upon their oaths and affirmations whether the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen be guilty of the premises in the indictment aforesaid above specified or not, because as well the said Ellery Ingham, Esquire, who prosecutes for the said the United States of America in this behalf as aforesaid, as the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen have put themselves upon that jury, and the jurors by the said marshal for this purpose impanelled and returned, to wit:

John T. Windrim,
7 Erwin C. Gery,
Joseph B. Hancock,
Wm. M. Bower,
Henry C. Phillips,
Wm. M. Coates,
Warren E. Perham,
Wm. B. Phillips,
Frank Kunkel,
Miles J. Engle,
Ellwood Rhoads,
Charles E. Besore,

being called, come, who, being chosen, tried, sworn, and affirmed to speak the truth of and upon the premises aforesaid in the indictment aforesaid above specified, do say upon their oaths and affirmations respectively that the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen are guilty of the premises in the indictment aforesaid above specified in manner & form as they stand charged in said indictment; and thereupon at the February sessions of the district court of the United States for the said district, held as aforesaid, on the third day of March, in the year of our Lord one thousand eight hundred & ninety-six, before the said the Honorable William Butler, judge as aforesaid, come the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, by their counsel, Wil-
8 liam W. Ker, Esquire, and say that the verdict aforesaid so as aforesaid found and rendered against the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen ought not to stand, and that judgment thereon ought to be arrested, and assign as reasons therefor:

1. Because this court has no jurisdiction over these defendants or to pass or impose sentence upon these defendants.

2. Because although the indictment charges that these defendants committed an indictable offence within the jurisdiction of this court, yet the uncontradicted testimony shows that the defendants are subjects of the King of Denmark; that they were in charge of a Danish vessel; that the men and boxes were taken on board the said vessel on the high seas beyond the three-mile limit and beyond the jurisdiction of the courts of the United States of America, and that no overt act or offense as charged in the said indictment was committed by the defendants or either of them within the jurisdiction of this court or any other court in the said United States of America, and therefore this court is without jurisdiction to try these defendants or to impose sentence upon them.

9 3. Because the record shows that this court has no jurisdiction over these defendants or any act performed by these defendants as alleged in the said indictment.

Wherefore these defendants pray judgment, and that they be discharged and acquitted of the said charge contained in the said indictment.

WILLIAM W. KER,
Attorney for Defendants.

And the said defendants, J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, by their counsel as aforesaid, William W. Ker, further say that a new trial of the issue ought to be granted, and assign as reasons therefor:

1. Because the verdict is against the law.

2. Because the verdict is against the evidence.

3. Because the charge of the learned judge in its entirety was unfavorable to the defendants and had a tendency to influence the jury against the defendants.

4. Because the learned judge erred in charging the jury as follows:

10 "The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, &c." This charge of the learned judge indicates that there was truthful and uncontradicted evidence that the defendants provided the means for or aided a military expedition by furnishing transportation, whereas there is or was no evidence that the defendants did, within the jurisdiction of the United States, furnish transportation for the purposes named.

5. Because the learned judge erred in charging the jury as follows: "To convict them you must be fully satisfied by the evidence that a military expedition was organized in this country to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it, as before stated." There is no evidence that a military expedition was organized in this country. The knowledge of the defendants that a military expedition was organized in this country would not be the subject of indictment unless the

11 means were provided and the assistance rendered within the jurisdiction of the United States, and a mere providing of the means of assistance to be used beyond the jurisdiction is not an indictable offense.

6. Because the learned judge erred in charging the jury as to what constitutes a military expedition as follows:

"It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government and have provided themselves with the means of doing so. I say provided themselves with the means of doing so, because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary nor is it important that they intended to make war as an independent body or in connection with others."

12 7. Because the learned judge did not affirm the defend-

ants' third point without qualification, and because of the instructions given concerning the said third point.

8. Because the defendants' fourth, fifth, sixth, seventh, eighth, and ninth points were not read to the jury or affirmed or refused.

9. Because the learned judge erred in charging the jury, in answer to the defendants' twelfth point, as follows: "They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore; if this be true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted; if, however, they entered into an arrangement here to furnish and provide the means of transportation and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat;" the
13 effect of the said instruction being to secure the conviction of the defendants for entering into an "arrangement" to commit an offense beyond the jurisdiction, although the defendants were not indicted for a conspiracy.

10. Because the learned judge erred in charging the jury as follows: "The evidence justifies the conclusion that the men were principally Cubans; they came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some description; they were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them, who were able to speak English, declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition." The defendants were not on trial for conspiracy. The said declarations were made upon the high seas and not within the jurisdiction of the United States and were not made in the presence of the defendants or any of them, and the declarations of persons not indicted with the defendants cannot be evidence against the defend-
14 ants.

11. Because the learned judge erred in charging the jury as follows: "That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt." There was no evidence that the men intended to fight against the government of Spain.

12. Because the learned judge erred in charging the jury as follows: "Thus you see what the defendants did. From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its object were and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three-mile limit stated." This instruction makes the guilt a matter of intention or preparation within the jurisdiction when coupled with an overt act committed beyond the jurisdiction.

13. Because the learned judge erred in charging the jury as follows: "The question, therefore, is, did the defendants understand they were to carry this expedition and had provided for it and understand what the expedition was before leaving here?" This instruction makes the question of understanding or intent or purpose the test of the guilt of the defendants.

14. Because the learned judge erred in charging the jury as follows: "When the men came to the ship off of Barnegat there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise."

15. Because the learned judge erred in charging the jury as follows: "The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do."

16. Because the learned judge erred in admitting as evidence against the defendants the testimony of Carl Arnston concerning conversations between the witness and men on board the vessel not in the presence of the defendants.

17. Because the learned judge erred in admitting as evidence against the defendants the testimony of the other witnesses concerning conversations between the witnesses and the persons on board the vessel; which conversations were not in the presence of the defendants.

18. Because the learned judge erred in charging the jury as follows: "We are suffering to day as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts as the result of want of faithfulness in executing the law." It is respectfully submitted that there was no evidence of the facts so charged by the court.

19. Because the learned judge erred in not charging the jury that the defendants must be acquitted under the evidence. The uncontradicted testimony shows that the defendants are subjects of the King of Denmark; that they were in charge of a Danish vessel; that the men and boxes were taken on board the vessel beyond the three-mile limit and beyond the jurisdiction of the court, and that no overt act was committed by the defendants or either of them within the jurisdiction of the court.

WILLIAM W. KER,
Attorney for Defendants.

17. And thereupon, at the February sessions of the said the district court of the United States, held as aforesaid on the 17th day of March, A. D. 1896, before the said the Honorable William Butler, judge as aforesaid, come the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, who are committed as aforesaid; and thereupon, arguments having been heard and due consideration having been given to the subject, the court is of opinion that the verdict aforesaid ought to stand and that a new trial ought

not to be granted, but that judgment ought to be entered and given on said verdict.

Whereupon the motions for a new trial and in arrest of judgment are by the court overruled, new trial is refused, and reasons in support of said motions are dismissed.

Thereupon forthwith, all and singular the premises being seen and by the court here fully understood, it is considered and adjudged that the defendant J. H. S. Wiborg pay to the United States a fine of three hundred dollars; that he be imprisoned and confined in the Eastern penitentiary of the Commonwealth of Pennsyl-
18 vania for the term of one year and four calendar months; that he pay the costs of prosecution and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the said Commonwealth.

And it is further adjudged that the defendants Jens P. Peterson and Hans Johansen do severally pay to the United States a fine of one hundred dollars; that they be severally imprisoned and confined in the Philadelphia County prison for the term of eight calendar months; that they pay the costs of prosecution and severally stand committed until judgment be fully complied with, and that they be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the Commonwealth of Pennsylvania.

And thereafter, on the same day, the defendants Jens P. Petersen and Hans Johansen, by their counsel, William W. Ker and Charles L. Brown, Esquires, come into court and stating that they prefer being sentenced to the Eastern penitentiary for a period of one year, the shortest term for which persons convicted of
19 crime are sentenced to that institution by this court, where the statutes do not impose labor, and asking that they may be so sentenced, the sentences of the court as to the said defendants, Jens P. Peterson and Hans Johansen, are by the court here so amended as to read as follows, viz:

And now, all and singular the premises being seen and by the court here fully understood, it is considered and adjudged that the defendants Jens P. Peterson and Hans Johansen do severally pay to the United States a fine of one hundred dollars; that they be severally imprisoned and confined in the Eastern penitentiary of the Commonwealth of Pennsylvania for the term of one year; that they pay the costs of prosecution, and severally stand committed until judgment be fully complied with, and that they be subject in all respects to the same treatment and discipline as convicts sentenced by the courts of the Commonwealth of Pennsylvania.

And thereupon a bill of exceptions is tendered by the said defendants, by their counsel aforesaid, and the same, being duly signed by the honorable the judge of the court here, is in the words and figures following, to wit:

20 In the District Court of the United States for the Eastern District of Pennsylvania, February Sessions, 1896.

UNITED STATES
vs.
J. H. S. WIBORG, JENS P. PETERSEN, HANS JOHANSEN. } No. 29.

Be it remembered that in the said February sessions, 1896, came the said United States into the said court and impleaded the said defendants in a certain indictment in which the said defendants were charged with an offense under section 5286 of the Statutes of the United States of America, and to which indictment the said defendants pleaded "not guilty," and thereupon issue was joined between them.

And afterward, to wit, at a session of said court held in the district aforesaid before the Honorable William Butler, judge of the said court, on the twenty-fifth day of February, the aforesaid issue between the said parties came to be tried by a jury for that purpose duly impanelled (*pro ut* list of jurors) and came as well the said United States, by Ellery P. Ingham, Esq., United States district attorney, and Robert Ralston, Esq., assistant United States district attorney, and the said defendants by their attorneys, Charles L. Brown, Esq., and William W. Ker, Esq., and the jurors of the jury aforesaid, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the said trial the witnesses for the said United States were called and sworn and examined as follows:

21 ARTHUR V. HAZLETT sworn and examined by Mr. INGHAM:

I was born in the United States; I live in Brooklyn and am a steamboat pilot. On the night of November 9th last, about eight o'clock, I was put in charge of the steam-barge Stranahan; we laid inside of Atlantic dock, just inside of King street; when we came there we got a lot of boxes aboard, cases; some trucks brought them there; they were put aboard between eight and nine o'clock; the crew were on board the Stranahan and several people that I did not know; no one seemed to be in charge of the boxes and cases. Between ten and twelve o'clock we left the foot of King street and proceeded down the bay of New York; about twelve o'clock I turned in and went to sleep and did not wake up until seven o'clock Sunday morning; we were then off Sandy Hook point; when I woke up there were more people on board the Stranahan than when we left Brooklyn at night; between thirty and forty; there was some foreign language they were speaking; I do not know what nationality they were; all kinds of looking people, dark-complexioned people generally. We went down south along the Jersey coast, abreast Barnegat light-house; we were looking for a steamer; we found the steamer; she was lying to or at anchor; she was flying a white flag; the Stranaham, when we saw her, put up a white flag; we went alongside of the steamer and delivered the freight we

had aboard the steam-barge; the crew of the steamship handled the cargo; the men went aboard the steamship; she was from 150 to 175 feet long, had two masts, and her hull painted black; she was what we term a fruit steamer; I saw a man on the bridge I suppose was the captain; Captain Wiborg resembles the gentleman very much; I was a passenger on board of the Stranahan at the time; I
22 had no conversation with the men on board the Stranahan.

Cross-examined by Mr. KER:

I am not working at the present time for any one. I was not working in last November. I came here today the same as I came last time. I was on the tug as a guest. I had no business on there at all, only as a guest.

FREDERICK C. LEE sworn and examined by Mr. INGHAM:

I am an American citizen, live in Brooklyn, and am an engineer on steamboats. On the 9th of November last I was engineer on the steam-lighter J. S. T. Stranahan. We left the foot of King street, Brooklyn, I should judge, about ten or eleven o'clock that evening. We had on board quite a number of cases of different sizes. We brought it down the bay, and we met a tug below Staten island, and we got on board a lot of passengers, between thirty and forty, I should judge. She was a New York tug, called the Cham, and I think Captain Brantley commanded her. We took the men off the tug Cham in New York bay. I should judge by their appearance they were either Cubans or Spaniards. Before we left King street there was put aboard quite a number of cases, boxes of different kinds, different sizes, and different shapes. There seemed to be a man in charge of it. I heard him called "Doctor." It was done in quite an open way. They did not seem to be afraid of anything. After they got the men on board we went out past Sandy Hook and down the Jersey coast as far as Barnegat. A steamer laid there to an anchor. She had a white flag on the forward mast. We had the same kind of flag flying from our boat. She seemed to be what was called a fruiter, a small-sized steamer. I could not say
23 for sure what her name was. We ran alongside of the steamer, and all the boxes and freight that had been taken on at the foot of King street and all the passengers we took from the tug were put aboard this steamer; also two life-boats that we had taken aboard at the foot of King street. I saw some cases in the cabin of our steamer. It was some kind of leather or canvass case, as near as I could judge; that was in addition to the other cases.

Cross-examined by Mr. KER:

The steamer that we went to was off Barnegat light-house. She was anchored, I should judge, about four or five miles off shore. I think they can anchor possibly as much as ten miles off shore. I think there must have been probably thirty boxes, and I should judge between thirty and forty men. I spoke to a couple of those

young fellows there, and they said they were Cubans. I had no idea where we were going when we left Brooklyn. I was the engineer. The captain's name is William Lint. I have not been arrested for taking these men and boxes. Neither the captain nor the owners of the boat have been arrested.

Re-examined by Mr. INGHAM:

I had a conversation with some of the men we took off the Cham.

Q. Did they tell you where they were going?

Objected to as to anything that was said or took place on the boat in the absence of the defendants. Objection overruled. Exception by defendants.

A. Yes; there were two young men in the engine-room there with me, and I asked them where they were going, and they told me they were going to Cuba. They did not say what they were
24 going to do. That is all the conversation I had with any of the thirty or forty that came aboard from the Cham. They were dressed the same as other people.

JOEL RIDGWAY sworn and examined by Mr. INGHAM:

I am captain of the United States life-saving station at Barnegat. On Sunday, November 10, 1895, there was a steamer anchored off there that day. She came there somewhere not far from ten o'clock in the forenoon and remained until after two o'clock. She was not less than three miles off from shore.

Cross-examination waived.

ALBANUS FALKENBERG sworn and examined by Mr. INGHAM:

I am a member of the life-saving crew at Barnegat station, New Jersey. I was on duty on the tenth of November last. I saw the vessel come up the beach. She anchored off the shoals, and this steam-lighter came down and went alongside, and they looked to be to work there, but what it was they were such a distance off that I could not tell. I do not suppose she was any shorter than three miles off. She was south of the bell buoy, and that is three miles from the shoal—from the outer shoal—and it is fully three miles from the beach. She had not been there more than a few minutes before the tug came there and she went back to the southward again.

Cross-examined by Mr. KER:

The vessel might have been more than three miles from the shore. It was bright daylight.

CLARENCE CRAMMER sworn and examined by Mr. INGHAM:

I am assistant light-keeper of the Barnegat light. I was
25 at the *light*-saving station on November 10th of last year; the steamer laid to anchor off shore and the tug was alongside. I saw they were at work transferring cargo, but I could not tell what it was; the steamer was about three miles out, not any shorter.

Cross-examined by Mr. KER:

I only judged the distance the steamer was out by the bell buoy; she might have been a little further out than three miles.

CARL ARNSTON sworn and examined by Mr. INGHAM:

I am thirty years old; am a subject of Norway; my business is a fireman, and have been a fireman about thirteen years. On November 9th, 1895, I was employed as fireman on the steamer Horsa; Captain Wiborg was the master; Petersen was the first mate; Johansen was the second mate; the nationality of the steamer Horsa was Danish. I signed as fireman of the Horsa for this trip from Philadelphia to Port Antonio, Jamaica, and return; she was a fruit steamer. On Saturday, November 9, we left the wharf in Philadelphia between six and seven o'clock in the evening; we took two wooden life-boats besides the boats the vessel had; the steamer carried four boats; the two extra boats were placed in the middle of the ship; Mr. Hart was aboard; when we got down to the Delaware breakwater we went north up along the Jersey coast; to go to Port Antonio the proper direction would be south; we went north and came to a stop off what I heard them say was Barnegat light, and she anchored; she was about two hours lying out; after we anchored a steam-lighter came alongside; then
26 they took some boxes and men from the lighter and two boats. I did not count the men. I heard them say there were thirty-eight. I did not count the boxes; there were many of them, big boxes and small boxes. After taking the men and boxes aboard we lifted anchor and went south. When going towards Port Antonio they broke the big boxes open and took small boxes out of them; then they broke the small boxes, too, and took some guns and rifles out—guns and swords. The swords were about that size (indicating). The guns were distributed among the men that came aboard; each man got a rifle and each man got a sword. The men did nothing that I saw in marching or drilling or anything of that kind. They did not have a commander aboard, as I can say; only they had a big cannon on board, and they fired once with that; they just placed the cannon in the middle of the ship; it was a big cannon, about five feet long, on wheels; they fired the cannon once; that is all I saw. I did not count the rifles, but each man had a rifle, and he kept that rifle while on board.

Q. Did you have any talk with any of these men?

Objected to unless it was in presence of these defendants. Objection overruled. Exception by defendant.

A. Yes, sir. I was going in the forecastle one night, and he told us, "I go down to Cuba to fight."

Q. To fight who?

A. The Spanish.

I just asked him how much the captain got out of it for bringing them down, and he said, "He gets twelve thousand dollars for it;" that was all I heard. I talked with every one.

Q. Was there any one who seemed to be in charge of the cannon?

A. I heard it was a French grenadier. I heard the sailors tell it that the man who fired the gun was a French grenadier.

27 We got off Santiago de Cuba on Friday night at half past ten. After we stopped we lowered the boats down and loaded them with the boxes and men. There were not enough lifeboats and we lowered one of the ship's boats. After we lowered it the men came out and found out that a ship's boat was leaking. Then they lowered another boat from the ship and took the cargo from the first boat and put it in the next one, and after the boat was loaded we took them by the stern and tried to tow them ashore, and then one saw a light and we cut the ropes. We saw a masthead light. I don't know, but I heard them say it was a man-of-war, and after that we cut the rope and went away to Port Antonio.

There was painting done on board of the Horsa. The name was painted over. What I saw was in the middle. They painted the funnel. The original color of the funnel when we left Philadelphia were black, red, and yellow. They painted it black and red, and when we got into Port Antonio it was black and red.

After the boat started small boxes were thrown overboard. I heard him say that what was in the boxes were cartridges. I saw they were cartridges. I know they were thrown overboard after we left Cuba. I heard the sailors say why they were left on board of the ship. The men in the boats took all they could carry, and these boxes were left aboard behind, and then they were thrown overboard.

Cross-examined by Mr. KER:

I heard forty-eight boxes were thrown overboard. I saw the boxes, but did not count them; somebody told me it was forty-eight. They were small boxes. I joined the Horsa as fireman on the ninth of November of last year. I had been on one trip before. I was on the Leon three trips before I came on the Horsa. I do not

28 know that I had the captain of the Leon arrested for the same thing. I did appear as a witness against him for the same thing in Wilmington, Delaware. After I had been on the Leon I went to the Pinkerton agency, at Fifth and Chestnut streets. I was in the Horsa at that time. On the Horsa there were three sets of firemen, and I was on duty four hours and off duty eight hours. When we got to Barnegat I was off duty. I did not go down in the engine-room; I did not know they were fixing the

engine. I saw the men who were on the tug and I saw the boxes. The men came up on deck, and the boxes were put between decks; they were big and small boxes. I saw a big box there, about eight feet long, that had some wheels in it; the wheels were about four feet. I saw the muzzle or bore of a cannon; it was about six inches. The men hoisted the big box with a steam-engine and put it between decks; the men stayed on the vessel between decks; the men opened all the boxes. I saw them open one of them, the one that had the cannon in it; I can't tell how many they opened; I saw about twelve or thirteen boxes opened. I saw them take guns out of two boxes; they were guns and rifles; there was a short gun and a big one; they did not have any bayonets that I saw. Each man had a gun; they were doing nothing with the guns that I saw; they were not drilling that I saw; they did not have any soldier clothes on; they had a belt around here; they had swords about four feet long. I saw some of the men have belts, with machetes in them. I passed Cuba six times and I have been in Cuba. I know we got to Cuba on Friday night; I heard the mates say it was Cuba. I saw San Domingo before we got to Cuba; I saw Hayti and saw San Salvador. I saw two islands before I got to Cuba. The men got off on the east side. When they got off, the ship was on the coast of Cuba. We had Cuba on the starboard side when we went there. All I know is
29 that when the men got off Cuba was on our starboard side. I do not know that we were near Santiago de Cuba. It was night when the men got off. I do not know how far we were from Cuba. It was raining, and we could not see Cuba after we got the men in the boats. We did not go ashore at all at Cuba. When the vessel started she had four boats, and afterwards four boats more were on board. She usually carried four boats. On this trip she had eight. When she left Philadelphia she had six. I do not know what reason I had for counting them. Before the men got off the cannon was in the middle of the ship. It was the only cannon I saw on board. They lowered it down into the boat and laid it lengthways. It did not take up so much room; it left room for a man to row. They put the wheels in the boat, too, in the same boat with the cannon. The cannon had three wheels; two were large and one was small. Five boats went away from the steamer. The men on board rowed them. The boats were towed—not so long—about a ship's-length—about five minutes—then they left the ship and did not come back.

The ship was painted all over before she came to Cuba. I do not know that she was painted after she had been at Cuba. I do not know how many times a year a vessel is painted. Some ships paint them every trip—the funnel. It is a common thing to do it. They scrape the funnel first and then paint it red. Then they paint it any color they intend to paint it on top of the red. The sailors threw the boxes overboard. I did not handle any. I saw some other boxes of the same kind, and there were cartridges in them. I do not know what was in them. When I went to Jamaica I went on shore and got drunk, and was brought on board by the police

A. The captain says, "We'll make that all right." Then he went. He was in a hurry, I guess.

Cross-examined by Mr. KER:

I come from Sweden, and have been a fireman six years. I have been in the Horsa five trips. I know Arston and Frederickson; they were fireman on that voyage with me. I cannot tell how many boxes there were. I saw several boxes; they were different sizes. There were between thirty and forty men. They were dressed like you and me when they came on board. All that I saw them doing on the vessel was they had rifles and cartridges, and I saw three men had some exercise one day there with the rifles; two of them were standing in line, and the third one gave them exercise. I don't know what the rest were doing. I only saw them exercising once. I saw the cannon. All I can say it was about five or six feet long and about half a foot in diameter. The wheels were about three or four feet. I did not see anybody firing the cannon off, but I heard it all right. I went right up so that I could see the smoke, too. I heard it only once. I took a box of ammunition. I did not look what kind was in the box, but I *was* one of the other boxes open. I took the box just to keep it for my-
34 self, just to see what it was. My wages aboard the steamer were twenty-five dollars a month. The first time I told the story was two weeks ago to a man from Pinkerton's detective office. I now get two dollars a day and my board.

LUDWIG G. JENSEN sworn and examined by Mr. INGHAM:

I am a native of Norway; am twenty-five years old; am a subject of Norway, and my business is fireman on sea-going vessels. I was on board the Horsa on her trip from Philadelphia on the ninth of November last. We left in the evening, Saturday evening, between six and seven, and went down the Delaware and went north. About noontime we went to anchor. There was something wrong in the engine-room. I know that something was the matter. Between 1 and 2 in the afternoon the same day a steam-lighter came alongside of us, and a number of men were received aboard with boxes. There were between thirty and forty men and just as many boxes. We passed down the coast. On Friday evening, at ten o'clock, we stopped. We didn't drop anchor at all. The boats were lowered and the men put in them. The four boats were lowered, and the men in them couldn't carry all the ammunition with the four boats, so the captain gave them another one—one of his own boats. When that boat was put into water it sunk. The captain gave them another one, and it was stronger than the former one, so they stowed the cases or boxes and what they had and themselves in the boats and connected one with the other and went astern of us. We towed them towards the shore, I think. The night was dark as pitch. I don't know how far we were from land. We couldn't see land. It was dark before twelve, and after twelve it

started with a shower of rain. Just as we kept slowly ahead
35 a strange light was seen, and they thought it was a man-of-war. They cut the rope, the small boats astern of us, and we went full speed ahead.

The first day the men came aboard they were not doing much, because it was bad weather; some of them were sea sick and couldn't do nothing. The next day when we came into smooth water they got some canvass and sewed some small bags to put cartridges in; you know what they have over their shoulders; they opened the boxes and took out all the rifles and gave each man one rifle; the men said there was 150 spare rifles after each man had got one; those were put into blankets; there was a big bale of blankets came aboard, too, at the same time; the blankets were in a white bag; all the rifles were wrapped up in blankets in small bundles, five in each, I guess, or something like that; the rifles were taken out of the boxes and the boxes were thrown overboard.

The men didn't seem to keep a secret of where they were going or what they were going to do, so they told plainly that they were going down to fight the Spaniards; each man was given a rifle and a sword or machete, I think; it was not a sword that they use here, not that any soldier used that I ever saw before; it was a sharp cutting instrument of some kind. Some of them had belts and others hadn't; there was three kind- of cartridges and two kinds of rifles; there was small Winchesters for the cavalry men and other big rifles for the infantry; that's what they told me; the officers have big revolvers. I know from the boxes they opened that there was four kinds of cartridges, one for the machine gun; the man in charge of the gun told me that it was a Maxime repeat firing gun or something like that; it was worked with a slot and a crank; I saw it work and I saw them practising on it, and he showed me how they were doing it. I was there when they fired a shot. I heard it
36 was a French Canadian who had charge of the gun. It was what they call artillery; a small, light gun. I think it was about four feet or four and a half. The cartridge measured about two inches in diameter; it was worked by a slide. There was a crank on one side. They turned the crank off. The slide would come out, and there was a hole to put the cartridge in. Then the crank was turned on the half and the gun was shot. They put the cap in with the trigger; they had a line attached to it, and there was a man on the side of it firing.

After the weather became settled they opened the boxes. One day they were going to practice with the machine gun and were going to open the boxes to get cartridges for the gun. In one case there was a wrong mark. I think they were talking Spanish. They opened the wrong box; they opened a box with medicines and bandages in it. The man in charge of the gun drilled with his men. I should think he had about six or seven men; he put every one of them in their right places. I did not see any other drilling done aboard the ship; no other. I heard that every one that had a revolver was an officer, and they had different kinds of swords; more like the swords they use here. There was one that

seemed to be in command of them; they called him captain or something like that. He was an old man; he was said to be the man in command of the forty or fifty men. They threw overboard a number of boxes. The small boxes were taken out of the big boxes that came aboard. They were cartridges, I was told, for the Winchester rifles.

Off Barnegat six or seven of us went to the chief engineer. We asked him where we were going to go—we knew we were going to Cuba—so he says, "We won't risk it for our wages." Well, I think then the captain came along, and he says, "What's up here?"
37 The chief engineer says, "The men won't go without they get something for it;" so the captain says, "If anybody should get hung, it'd be me and not you." The captain said, "It's me that'd get hung if anybody should happen to get it." The language he used—he said, "Go down below and not see what's doing or being done." The shipping master, Mr. Larsen, gave me $25 after I got back here to Philadelphia; I don't know where it came from; I got it all right and that's all I cared for. I did not testify before Commissioner Bell; I had no business to go up; the captain did not say anything about it.

Cross-examined by Mr. KER:

I am a Norwegian; I have not become an American citizen; I never thought it necessary. I spoke to the chief engineer and he did the talking with the captain. He said that if anybody should get hung for this it would be him and not us, so we didn't have anything to care for; that we shouldn't care. That's all he said. There were as many boxes as the men, between thirty and forty. I did not see forty boxes thrown overboard; the boxes thrown overboard were all containing cartridges. I saw six men at drill at one time, drilling with a gun; it was iron or steel, I believe. I should think the wheels were four or five feet. The only drilling I saw was amidships. The gun was not pointed over the side. I saw the man drilling with that gun once in the daytime. The men were all going around the deck just like ourselves, walking and lying around and some sitting around. For each man I saw I saw a rifle, because they always carried them with them around the deck; they were walking around the deck with rifles. None of them had bay-nots. I know they were rifles by looking at the outside of them; I never handled a Winchester. I don't know anything more than they told me; I do not speak Spanish; they talked to me in English; I
38 should think more than half of them, or about half of them, spoke English; some of them were brought up in this country and some were born Americans. They took away with them all the boxes they could get in the boats. They did not throw any boxes overboard. They left them there for the crew to throw them over. My wages were $25 a month. I first told this story sixteen days ago to an officer or clerk at the Pinkerton office. Mr. Larsen, the shipping master, gave me $25 when I came back to Philadelphia. I don't know what it was for. I should be a fool if I didn't take it.

I didn't ask any questions. I know it was coming to me. I get $2 a day, paid to me at the Pinkerton's office. Oscar Svensen, the witness before me, took me there. They took my statement down in writing. They typewrote it. I have read it twice—three times.

EMIL FREDERICKSON sworn and examined by Mr. INGHAM:

I am a fireman. I was on the Horsa from November 9th to 27th; was shipped here in Philadelphia as a fireman. We left here Saturday night. The next morning I went to sleep at 4 and slept till 7. When I had breakfast somebody says, "We didn't go down; we came up to New York." I saw land on the port side, a sandy coast like the American coast. Somebody told me we were going up to take ammunition on board. Some of the crew said that, the donkey man. We came to a stop at Barnegat light. A steam-lighter came alongside, named the Stranahan. Aboard the steam-lighter was about thirty or forty men and thirty or forty boxes of different sizes. They came aboard. John Hart, the charterer of the ship, was on board from Philadelphia. I saw him when I woke up that morning. The anchor was dropped. They put those thirty or forty men on board. Then we hove the anchor and went down south; got the land on the starboard side.
39 We went down to Cuba. We did not touch at Cuba. We passed it so that we could not see it. We stopped Friday night—between Friday and Saturday. We put those two boats out that came aboard in Philadelphia; that came with that steam-lighter. About 11, when the first boat was out, we started to get the ammunition. The boxes were put in the boat. The whole party of men and boxes left in the boats. On the way down, after we left Barnegat light, the men emptied the boxes. There was a big one with a cannon in it. That was the only one. There were others smaller, with two wheels. In the other boxes there were rifles—longer and shorter rifles—two sizes of rifles. They put them in blankets. Each man got one, and the rest they put in blankets. They were put aboard the boats and taken ashore. I saw the men drilling on their way down. I saw the cannon put upon a wheel and something put underneath, so that the cannon could stand up. One man was standing behind and two standing there, and the officers had spoke only English were standing there. They were drilling. One was cleaning with some arrangement with the ammunition. They were only playing that—drilling. I did not see them make use of the rifles. They lost one rifle overboard. There was a man to look after the gear.

By the COURT:

Q. Did you go with the other firemen and express your dissatisfaction off Barnegat?

A. I went down in the stoke-hole. A shipmate says, "Come up; somebody wants to see you." I went up on deck, and when I came up he says to me, "We want to see the captain about this game."

Q. Who said that?

A. The man that was first here this morning, Svensen. He says, "We'll see the captain about this game, or the chief engineer. We won't go down there and get shot." The chief engineer was coming along, and we says to the chief engineer, We won't go down there. We didn't sign for that. We were going in the fruit trade; we didn't go aboard for that, and he says, "Only you shut your mouth and keep quiet. You have no business with that; you have nothing to do with it." He asked me if I was afraid to go down there, and I says, No. He says, "Go down and look after your fire. You have nothing to do up here." I says, "All right." The captain passed by, and the captain says to the chief engineer, "What's the matter?" "Oh, he says that he won't go; that he's afraid." The captain says, "Shut up; shut your mouth. You've nothing to do with that. Go down where you belong to. Get away." I couldn't see the country or anything. I went down.

By the district attorney:

Q. Was that all the captain said?

A. Yes. That I heard before he went down. Well, the captain was talking about something that he would pay us extra for. He said that at the same time. He said, "Pay extra;" that was all. When he went away he says, "We'll pay you extra; go ahead." About half of the passengers could speak the English language. There was a young fellow looking a little sick of it. I says, "What's the matter with you." He says, "I don't care to go down there." I says, "What did you went for?" "Oh, well," he says, "my father and mother was Cubans, and talked a long time to me, so I went." The Cubans called one of these men captain. I don't know what he was. He only spoke the English language. About eight o'clock he says, "Well, when it comes—the gunboat here—will you men help us to fight?" He said that about two hours before they went into the boats. He said,
41 "Will you fight when there comes a Spanish gunboat?" He said that to me. "We'll give you a rifle each." Well, I say, "I don't care." He was the same man that drilled with that cannon. He was talking the English language. He did not speak Cuban himself, and had to get a man to speak for him. He was the man who had charge of the cannon. He looked like a man who had been a soldier before, an officer in the army; how a man looks who has been an officer. He has a military size, and he always is straight, and looks like a soldier; puts his head up.

Cross-examined by Mr. KER:

I may have forgot something. I had answered what I was asked. These men had rifles and a cannon. They had wheels underneath them; wooden wheels with an iron ring around and a little iron wheel; three wheels. It wasn't so heavy. I should think two or three men could carry it easy. When we were talking to the captain we weren't talking about money at all. The men drilled.

The cannon was set up on deck on a wheel. Two men were behind the cannon. Then they carried ammunition to the cannon. One officer was standing one side of the cannon, and some there, and other men over here. There were six or eight officers, but there was only one man that they called officer. The Cubans called him captain. I don't know whether he was a captain or not. I did not see the men drilling with the rifles. None of the men had soldier clothes on.

My wages were $25 a month. Some time last November I went to the Spanish consul. I went over to New York and hunted up the barge and the tugboat and the witnesses, and brought the witnesses here. I took charge of this case. I started it; I catched it; I picked it up; I fixed the thing up; I saw the witnesses and
42 fixed it up. I am not an American citizen. I have declared my intentions and want to become a citizen of the United States. I am a Dane. Denmark has some islands down in the West Indies. When the Horsa was a Spanish steamer down in those Danish islands I won't keep quiet or say that was all right. I would not have the Spaniards do anything against my country, and I don't want a Dane to go against Spain. I get $17 a week. The first time we came to New York I told the Spanish consul I must go to sea again. He asked me where I was living and how much I got as a fireman. I say I have been firing for $40 a month and my feed, and I have been working for $15 a week fireman, and I have been working at that in Philadelphia, and he says, I'll pay you firemen's wages. I get my money myself, my $17. I have paid out of this $17 my board, clothes, and everything else. I get my money cash in Pinkerton's office, down on Chestnut street.

H. C. B. MURRAY sworn and examined by Mr. INGHAM:

I live at Port Antonio, Jamaica, and am assistant collector of revenue under the English government. The Horsa arrived on the 16th of November, and I boarded her. Captain Wiborg informed me that he had very bad weather and had lost several of his boats overboard. I noticed that the forward port was open, and in asking him to explain it he said that he had been cleaning out the hold. I made search of the ship and found nothing particular then, but by-and-by, from information that I received from Frederickson, upon a research in the forecastle I found a canvass bag containing 60 cartridges. We had a case against him in court, but it was withdrawn. I noticed the funnel was red and black
43 Before she was painted yellow and red, but on this occasion the funnel was painted red and black. On the former trip she had the name "Horsa" written amidships, and on this occasion it was painted out red.

Cross-examined by Mr. KER:

I made a thorough search of the vessel. I found nothing the first time. The second time I found a bag of cartridges. Frederickson simply intimated there was some ammunition on board, and I

searched for it. I know that the J. D. Hart Company have been trading to Port Antonio for a number of years and have a legitimate business in the fruit trade. The captain told me he had had bad weather. I examined the ship's manifest, and it was all correct. I came here at the instance of my government and am under the impression that I was sent at the request of the Spanish government. I came here in December, and have been here ever since, at the expense of the Spanish government. I believe my hotel expenses were paid by the Spanish government.

By Mr. INGHAM:

Q. What do you know of any condition of war or insurrection in the island of Cuba?

A. I don't know anything about it.

Mr. KER: I will relieve the district attorney and the court on that subject. I will admit that there is an insurrection in Cuba, and that the Cubans hold two-thirds of the entire island. I will admit that there is a war and will admit that these defendants know it.

JABEZ BOWEN sworn and examined by Mr. INGHAM:

I live at Port Antonio, Jamaica, and am one of the water police in the service of the British government. I made a search of the Horsa at the request of Mr. Murray and found in the fore-
44 castle, underneath one of the lower bunks, a small bag containing cartridges, and I handed them to Mr. Murray. I did not see the name of the Horsa written amidships. I saw red paint standing over where the name used to be. I also noticed that the funnel, which was yellow, red, and black, was painted all over in red.

Cross-examined by Mr. KER:

Neither the captain nor mates of the ship were present when I found the bag of cartridges. I came from Jamaica and have been here since last December. The Spanish government paid my way.

LUDWIG JANSEN recalled and examined by Mr. INGHAM:

I believe it was twenty-five persons that composed the crew of the Horsa, exclusive of the officers. The officers were Captain Wiborg—Mr. Petersen was the first mate; Mr. Johansen was the second mate. There were three officers down, subordinate officers. The Horsa was a vessel plying in the fruit trade between Philadelphia and Port Antonio.

The Government's case rested.

The case for the defendants was opened by Charles L. Brown, Esq.

CHARLES VITHOLM sworn and examined by Mr. KER:

I was on board the Horsa on the ninth of November last year, when she sailed from Philadelphia. I was third engineer at that

time. I know these firemen that have been on the stand; they were on the vessel on that trip. When the men came on board at Barnegat I was not on deck and did not see what came on board, neither the men or boxes. During the voyage to
45 Jamaica I saw some men on board; I saw some men on deck, about twenty, all around the deck. Some of the men had guns in their hand and some put them on the hatches and anywhere. It was about from ten to twenty guns that I saw. Some had guns and some had none. The men were not drilling. If they had been drilling I would have seen them sure. Some of the guns were rifles; double-barrelled rifles we would call them at home. I saw a cannon on board. It was about three feet high. I did not see or hear that cannon fired off. If it had been fired I would have heard it. The ship was a small ship and I must have heard it. I did not see the men drilling with the cannon; I did not see the men get off the vessel; I was not on deck at the time. The funnel was first scraped, then painted red, and then yellow paint put over the red; that is the way to keep the rust away. I have been in vessels that painted it three and four times a year, and some only two times a year. The men that I saw on deck were not dressed as soldiers. Some of them had knives—machetes. They were bananna knives, for cutting the grass and to cut bananmas. I have been in Cuba—over the whole of Cuba—and saw those knives. The men who work on ships or in the country use them. They use them on their sides the same as soldiers; they use them to cut bananmas, to cut down cocoanuts and sugar-cane, and they use them for everything else; that knife is just as handy to them as a pocket knife to me. They carried them on their sides; some in belts and some not, and some have a string and all working men carry them.

Cross-examined by Mr. INGHAM:

I did not see the men come on board. After they came on board I saw them about the vessel, on deck. I do not know when they got off; I did not see them drill. I did not hear the cannon
46 fired; I saw the cannon on deck, on wheels, on small wheels; I did not see them take the cannon out of the box. I did not see the men all wear a little Cuban flag on their hats; I did not see any of them have a Cuban flag.

G. A. MACHOLD sworn as interpreter.

DOROTHEA NELSON sworn by the interpreter and examined by Mr. KER:

I am the wife of the chief engineer of the steamer Horsa. I was on the steamer on the ninth of November, when that steamer sailed from Philadelphia to Jamaica. I occupied my husband's cabin or state-room—that is, part of the cabin—and ate in the captain's cabin. During the voyage I was on deck most of the day. I saw men on the ship differing from the crew and officers; about fifteen or twenty men. Some of them had guns; I did not notice how

many, but I saw from ten to twelve at one time. The men were dressed like the crew of the ship; they had all kinds of clothing on; they were not dressed like soldiers; some of them had belts. I did not see any drilling at any time. I saw a cannon on board, about three feet high and three feet long. I did not hear the cannon fired during all the time I was on the vessel; it could not be fired without my hearing it.

EDWARD W. PAXIS sworn and examined by Mr. KER:

I have served as a soldier of the United States. I have been in Cuba; have seen the people there; am somewhat familiar with the plantations; have been on them, and have noticed the people in their manner of life and what they used.

(Machetes shown witness.) I know these things; they are machetes; they are of different sizes and of different make.
47 I have seen the people in Cuba have them. As a rule, butchers, everybody, carries them outside of the main cities. I have seen them in a scabbard, some without a scabbard, and some with a belt. The majority of the people carry them; they use them for general use in agriculture, for general utility, the same as the farmer would a hoe, and I have seen them in the houses, and they are generally used.

Cross-examined by Mr. INGHAM:

I have never seen children play with them; no. I should suppose it is a formidable weapon. I have seen the military in the ports. I have never seen citizens carry guns.

HERBERT P. KER sworn and examined by Mr. KER:

I have been on most every island in the West India islands. (Machetes shown witness.) I have seen these instruments. They are machetes. I have seen them in Jamaica and Barbadoes and nearly every island in the West Indies. There are different makes of them and different sizes. They are used for cutting down bananna trees, cutting grass, &c. Most all the inhabitants carry them. They are in common use. They wear them around their waist attached to a strap or belt; sometimes over their shoulders attached to a sling or string. I have been on the Horsa. I took a trip on her to Africa. About between two and three months I was on board. That was last March. I noticed the name of the Horsa on the stern of the boat. It is in brass letters about six inches long—raised letters—raised about an inch—that stand away up from the hull of the vessel. I have seen the vessel painted at sea on numerous times—her funnel. They first chip it off with a hammer, then put red lead on it to keep the rust out, and then they paint it any color they want after that. I have seen it done at sea on more vessels than one, and it is generally done when they get into the warm climate.

48 FREDERICK SVANOE sworn and examined by Mr. KER:

I was captain of the steamer Leon, and have been to Cuba very often. (Machetes shown witness.) I know these instruments; they are called machetes.

The COURT: I think that is sufficient proof. There is no question about this at all.

Mr. KER: I want to show that these are instruments for agriculture, in general use, carried by most of the people.

J. H. S. WIBORG sworn and examined by Mr. KER:

I was captain of the steamship Horsa: it will be two years in May since I took charge of her; I was her captain on the voyage on the ninth of November of last year; we left Philadelphia between six and seven o'clock in the evening, bound for Port Antonio, Jamaica; I had cleared from the custom-house. The Horsa is a Danish vessel, sailing under the Danish flag. Before leaving Philadelphia the name was scraped out on her side because it was rusted and painted over with red lead; it was done by my order, and no changes made in the other names; there is the name on the stern, brass letters, riveted on the stern, standing out about three-quarters of an inch and about six or eight inches long; the name is on the bow, the same kind of letters and the same size as on the stern. I was sailing under charter from John D. Hart & Co., in the fruit business, and were then sailing for a cargo of fruit. When we left Philadelphia we had as cargo two boats and a lot of empty boxes and barrels, and had two horses, some horse food, and bails of hay and bags of corn: they were on the manifest.

Before sailing I received a message, which was, after I passed the breakwater to proceed north near Barnegat and wait further
49 orders. I left the pilot at the breakwater and steared north according to my orders; I stopped off Barnegat, between four and five miles off shore, as near as I can judge, and anchored. I anchored because one of the engineers came up and said that one of the bearings was hot, and he would like to have an hour or two to fix this bearing; then we anchored to keep in smooth water to give him a chance to do this, because it was blowing a gale of wind from the northwest.

A tug or lighter came to us; in the tug there were a lot of men; they brought a message; there was a man brought me a message from John D. Hart & Co. He told me to take those men and luggage and whatever they had aboard the Horsa and let them off whenever they called for it to be let off. I shipped two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia. The boats that I had shipped in Philadelphia were cleared for Port Antonio, Jamaica, and the first intention was to deliver them at Port Antonio, Jamaica. The only order was they had a colored man there that they called the pilot, and whenever he called for them to be let off I should let them off and give them the boats.

By the COURT:

Q. What were you to do with the boats that were taken from Philadelphia and the boats that were taken on off Barnegat?

A. To deliver them to these men as soon as they called for them.

By Mr. KER:

The men walked through the port on the between decks. The ship had three decks. The between deck was the second deck of the ship. They had a lot of boxes and their luggage, and
50 they were stowed away on the same deck, the between deck. My men helped to put them aboard. We helped them to get the luggage aboard. The boxes were of different sizes; the largest was about six feet long; there was no block or tackle used in hoisting them up; they were all lifted aboard; a tackle was used to hoist the boats aboard.

After the men got aboard I sailed on my course on down past Watling's island or San Salvador, as usual, and kept on down to Jamaica. Watling's island was the first land we sighted after we left Barnegat. It is called Crooked Island passage. There is a number of islands and it is called Crooked Island passage. We can see those different islands one from the other. After we get out of the passage Cuba is about south by east. Going down to Jamaica we always strike Cuba and sail along the coast for about six hours. From there San Domingo is visible on a clear day, and Hayti.

The men got off about six miles off the Cuban coast. The colored man that they called the pilot came and told me to let them off. I stopped the steamer and lowered the boats in the water. The men got off through the port. They took their boxes with them, not all of them, but the biggest part of them. They did not have enough boats. At first they had four boats and I sold a boat to them. It was not my boat, it belonged to the owners of the ship. The boats were lowered aft and they were all tied to each other at the stern. They asked me to take them further in and I said I would do it. I towed them about fifteen or twenty minutes along shore and I saw them leave the ship.

When the men came aboard they had not the appearance of soldiers. When I started from Philadelphia I did not know that we were going to take these people and their goods on the Horsa.

According to my opinion I had no right to refuse to take
51 them. My charter called for me to go wherever the charterer sends me between the St. Lawrence river and the River Platte.

By the COURT:

Q. Have you the charter here?

A. I haven't got it, but I can produce a copy of it.

By Mr. KER:

Q. Where is the charter?

A. In the agent's hands in New York; I can produce a copy of

the charter by tomorrow, because I am sure there must be one at the charterer's office; he is supposed to have one.

The men slept between decks; they were not in the cabin; my vessel did not supply them with food; they brought their own food—canned goods and hard-tack; they had it in boxes; there were thirty-nine men. I did not count the boxes, but I suppose there were about forty-five, as near as I could get. I did not say all the boxes had canned goods and hard-tack in them. I said they brought boxes with their own food; where they had tin cans with them some of the boxes contained that, and those they had between decks; they fed themselves; they did not call on the ship for any food.

Some of the men on the ship had guns. I saw about half a dozen. I did not examine the guns; there was not anything to attract my attention to them; it did not attract my attention because the men had guns. I have often seen passengers carrying guns aboard my ship. I did not see the men drill. I saw the cannon. I did not examine it; it did not attract my attention, because it was about the same size—a small gun—a cannon about the same size as the ship's cannon, say about three and a half feet long. I did not notice it at first. I did not know it was my own or theirs when I first saw it;
when I first saw it I thought it was my own. I had a
52 cannon on board of the same size. I had two of them, one
of about the same appearance and the other was a small brass gun. The cannon they had they took in the boats with them. I did not see any ammunition for a cannon. I did not see any of the boxes broken open, and did not know that the boxes were broken open and arms taken out. When the men got in the boats the men had their guns and their machetes. Some of them had guns and some had not.

By the COURT: Some of them were carrying guns when they got on the boat?

A. No, sir; nobody was carrying guns when they got on my boat.

By Mr. KER:

When they came aboard I saw no arms. I do not know where they got them. When they left some of them had guns. Some of them had machetes. I saw plenty of them before. They would not attract my attention.

During the voyage the funnel was painted; that is not anything unusual. It is painted when it is needed, generally three or four times a year, at least. The name was not painted out on the stern nor on the bow.

When the men left the vessel the boxes that were left were thrown overboard by my orders. I did not open any of the boxes. There seemed to be something in the boxes. I do not know what was in the boxes. I wanted them thrown overboard.

By the COURT:

Q. Why?

A. Because I could not come in the port of Antonio.

Q. Why not?

A. Because they would have seized the ship and the boxes too, and I would get in trouble in Port Antonio.

Q. Why would they seize the boxes?

53 A. Because they were not manifested for Port Antonio.

By Mr. KER:

If they were not on the manifest, there would have been trouble in part in Port Antonio; not all the boxes that were in the hold were thrown overboard, because there were a lot of large empty boxes; some of the boxes were full, some were open, and some empty. I saw empty cans around them; my orders were to clean out the hold.

At the time we left Barnegat the firemen came to the chief engineer. I suppose there were about five or six of them. The spokesmen were Lew Johnson and Emil Frederickson. They talked to the chief engineer, and I came along and said to the chief, What is the trouble here? and he said, These men won't go unless they get some extra pay. I said to them, "You better go down below and mind your own business; you have nothing to do with that. If there is anything wrong, I will take the responsibility."

These men (pointing to the two mates who are the defendants) had nothing to do with this ship or with this business. They listened to my orders; they were under my orders. I was the master of that vessel. I am responsible for all that was done. I know if I go to a Spanish port again my life would not be worth a pinch of snuff, but I will take that responsibility.

When I was taking the men and their boxes on board I did not know there was anything wrong in it. I did not suppose there was anything wrong in it. I do not know where they went to. I do not know whether they went to Cuba or not; all I know is I left them out at sea, about six miles off the coast. None of the men told me they were going to Cuba. The pilot did not tell me where he was going. I did talk to him, but he could talk very little English. I did not think there was anything wrong about

54 it. If there was anything wrong about it, I am willing to take the consequences.

Cross-examined by Mr. INGHAM:

I am a Dane, and am still a subject of the Danish government. I have been in the employ of John D. Hart & Co. two years next May coming and have been engaged in the business of sailing a fruit steamer from Philadelphia to various West India points. I had a charter-party which gave me a range from the St. Lawrence river to the River Platte, in Brazil. I got that sent from my agent in New York. I got that as soon as I came over and took charge of the ship. There have been three different charters from the same man, Hart, with the same clause in it. I got that charter as soon as I took charge of the ship for John D. Hart & Co., and that was two years ago. The charter does not state that I was to sail a fruit

steamer from Philadelphia to Port Antonio and return, but I was doing that; as a general rule I made a voyage every fourteen or fifteen days.

When I left Philadelphia on the ninth of November, 1895, I had no knowledge that I was going to have an unusual incident on that voyage. I expected to go direct. John D. Hart was not with me when I started. There was not anybody with me except the ordinary crew and excepting the pilot. I did not say I received orders when I got to the Delaware breakwater. I received orders at the wharf here; those orders were in writing. I have not them here. I might find them, but I did not keep them when I left the ship. Those orders were from John D. Hart & Co., and they were in writing. I will produce those orders if I can. Those orders were for me to proceed north after I left the breakwater until I got to Barnegat and there to await further orders. I did proceed from the breakwater and anchored off Barnegat. Then the tug came alongside
55 and put the men and boxes aboard. They brought with them to show their authority another order from John D. Hart & Co.; that was in writing. I do not know whether I can produce that order or not. I will hunt for it. I did not think it was of any consequence. No, sir; I did not think it was of any consequence that my vessel was boarded on the high seas by a tug, by a lot of men with boxes and things; that did not strike me as particularly important. They might be common passengers; that was the first time in my experience in trading between here and Port Antonio when I have been boarded by thirty or forty men and a lot of boxes put aboard; that did not strike me as being unusual. I could not tell whether or not I have that order, but I will hunt for it. I will try to produce it. I am sure I can produce the charter-party, but whether I can produce the order I could not say. As near as I can remember, the writing from J. D. Hart & Company said to take whatever was in the tug, the men and their luggage and boxes, and let them off whenever they called for it to be let off.

By the COURT:

Q. And that did not strike you as an unusual or uncommon thing?

A. No, sir; it did not strike me as anything unusual.

Q. That they should be let off wherever they asked to be let off and take the boats with them; that indicated they were to be let off at sea somewhere, did it not?

A. Yes, sir; it did.

Q. Did it not strike you as unusual that these men were to be taken on board and turned out on the sea with the boats?

A. No; it did not.

By Mr. INGHAM:

Q. Have you ever had an experience of that kind before in
56 your whole life as a navigator?

A. Yes; I have had it on the coast in Jamaica and Cuba.

Q. Have you ever had an order to receive a number of men and

boxes on the high seas and let them off whenever they wanted to get off?

A. Not boxes, but I have had them on the coast in Jamaica and Cuba, when they got on the boat, and whenever they wanted to be let off I let them off before.

Q. In your whole experience as a navigator before did you ever know of receiving an order from your owner that allowed a number of men to board your vessel on the high seas with a whole lot of boxes and luggage, with an order that you should let them off on the high seas when they asked you?

A. No; I never had such an order as that. I never had such a thing occur to me before.

Q. What did you suppose was their purpose?

A. I supposed it was their purpose to go down to Cuba.

Q. And you supposed these men were going there to assist the Cuban insurgents, did you?

A. Yes, sir; that is what it was, too. These men brought their own provisions. The ship did not nourish them during the time they were there. I did not see any of them drink coffee. I do not know that their coffee was cooked at the galley. I would have known whether they got other provisions on board, because it was my duty to pay for the provisions, and if there was anything given out I would see whether they were short of provisions. There may have been one or two beg of the cook a cup of coffee. I don't know. It was not furnished by the vessel.

I do not know who was the commander of that expedition.
57 I do not know him. A colored gentleman that they called pilot gave me the order to take them aboard and let them off. I could not tell you his name.

After the party came on board I did not see them open any boxes. I do know they were opened. I suppose so, at least. I suppose they took out of those boxes a lot of guns and short swords of this kind (indicating), because they were not opened when they came aboard, and after they were opened, after they came aboard, they had guns in them. The men had belts on. I did not see any cartridges. I did not see them sewing up any cartridges. I saw bags they sewed up. I knew they had a cannon. The one I saw was not a Maxime rapid-firing gun. I did not examine it. I could not say that there is only one size of Maxime guns. I am not that much of an artilleryman. It might have been a Maxime gun for all I know. The men were on deck. A few of them had pistols or revolvers. I do not know and nobody ever told me that the men who had revolvers were the officers of this expedition. I had conversation with some of those men. We talked over different topics. They said they came from the United States; they told me from Boston. They said they were going to Cuba. They did not tell me what they were going to do there; that was not mentioned. They did not tell me what they were going to do with this cannon. I would not have gone into such a conversation.

Q. You knew very well what they were going to do with it, did you not?

A. I had my own thoughts about it.

Q. You knew they were going down there to fight, did you not?

A. No; I did not.

Q. You knew as well as anybody, did you not?

58 A. I did not know; nobody ever told me. I supposed they were going there.

Q. And you thought it would be all right for you to help them get to Cuba and let them fight to free Cuba?

A. I only thought that I did not violate any law by taking those men when I did take them.

Q. You thought that it was a perfectly proper thing for foreigners like yourself from Denmark, employed by an American merchant, to convey a filibustering or military expedition from the United States to Cuba to fight against the King of Spain?

A. You must excuse me. I do not think we were on a filibustering expedition or any military expedition, either; not as I think we were.

Q. What kind of expedition did you think it was if you had forty men with rifles and machetes and a cannon and a lot of ammunition and bullets and revolvers; did you think it was a Sunday-school excursion?

A. It might have been.

Q. You did not know?

A. There were two hundred negroes that I carried over to Africa from Savannah last spring, and there were about 150 of those that carried revolvers; that is the reason I did not think anything strange of it.

Q. Do you not know and did you not know that those men were going there to fight for Cuba?

A. I did not know it.

By the COURT:

Q. Did you believe it?

A. Yes; I believed they were going there?

59 By Mr. INGHAM:

At Barnegat I did not see any men leave the Horsa and go aboard the lighter. John D. Hart did not go down the river with me and get aboard that lighter. The firemen did go to the chief engineer and I overheard the conversation. I did not hear them say they did not want to stay on the ship; they made some complaint of that kind. I told them if anybody had to hang for this I would be the man to hang for it. I told them they had better go below and mind their own business. I do not know whether I mentioned that it would be all right. I only said, "You got nothing to do with it; you better go down and mind your own business." The name of the Horsa was painted out amidships; the copper letters on the back of the ship were not painted over, to my knowledge; it might have occurred without my knowledge. I do not believe that name was

painted again ever since we ran that trip; it is the same shape still; it would have been possible to put black paint over those copper letters, but that would not hide the name. The regular color of the funnel, as long as we were with J. D. Hart & Co., was fellow below, with red above and black on top; when we left Philadelphia it was painted in that way; while we were at sea the colors were changed to red and black, and when we got to Port Antonio it was red and black, and when we got back to Philadelphia it was black, red, and yellow. We did that because it was necessary to paint her; we scraped the funnel and had not time for the yellow; I put on the yellow paint when I first got back.

It is true that when we got off the Cuban coast about six miles I had the lights of the vessel put out. I saw a light in the distance. I could not say what it was, only I know it was a strange light and it was reported to me. I reported myself to the boats that
60 there is a strange light ahead and I did not know what it is; we were towing the boats and were going slow. I was told to cut the boats loose. I cut the boats loose and started ahead at full speed.

I supposed when I left from Philadelphia with the two boats that they were for Mr. Hart's fruit business in Jamaica. The two boats that were brought aboard from the lighter I knew were for the men, and my orders were to deliver those boats to the men. I did lose one of my boats, one of the ship's boats. I lost one at sea in the Gulf stream; it was smashed, damaged. I sold the boat to the men. I told the collector I lost two boats to put him off his guard. I did lose them in a certain way.

By the COURT:

Q. Did you mean to tell him an untruth?
A. No, sir.
Q. Did you mean to deceive him?
A. No, sir.

By Mr. INGHAM:

Q. You did tell him an untruth, did you not?
A. No; I don't see how.

By the COURT:

Q. You told him you lost the two boats?
A. Yes, sir.
Q. Did you mean him to understand that you lost one by selling it to these Cubans?
A. No; that isn't the two boats we are talking about; we are talking about these two boats that I got in Philadelphia.

By Mr. INGHAM:

Q. I was talking about the ship's boats.
A. I understand you. I lost one of them. During that
61 voyage I parted with two boats; one was lost on account of bad weather.

Q. Why did you tell Mr. Murray that you had lost two boats on account of bad weather?

A. I might have told him so, but I don't recollect that myself. I could not swear that I told him so.

Q. Why did you tell him that?

A. I do not know that I did tell him so.

Q. Do you deny that you said it?

A. I don't deny it; no. I can't deny it, because I can't recollect. What answer I gave him I couldn't say.

After we got back to Philadelphia we had no arrangement by which the crew was to get a little extra compensation for that trip. We had no arrangement at all. I did not pay twenty-five dollars to one of these men. I do not know that it was paid. I did not get any extra compensation myself. I will swear to that. I do swear that I neither directly or indirectly get a greater compensation than usual on account of this trip of the ninth of November last year.

Re-examined by Mr. KER:

That cannon was not fired on board; I must have been sleeping very hard if it was fired, because I slept in the chart-room and the cannon was standing right in front of it. I did not hear it fired.

Trips to Jamaica are not the only trips I have made for J. D. Hart & Co. I have gone to Africa and to Cuba and Savannah and different ports. On the African expedition they had about 150 guns. I have before taken people down to the island of Cuba and landed them, not at a port, but at some other place. It is the custom down in that place, among those islands, for people to
62 come in boats on the vessel and to pile their goods on the vessel; they might pay the agent for it; they did not pay me anything; they go in that way from port to port. I have been into different ports in Cuba and went from there along the coast and picked up fruit along the coast; they are not clearing ports, and when people came on board they were taken to other places on the island; there is nothing unusual or uncommon in it. I supposed those people were going to Cuba to fight; I had no positive knowledge about it. If I had known they were going to Cuba to fight I would have taken them. I am not concealing anything here; I have no cause to conceal anything, and am telling the whole truth.

Recross-examined by Mr. INGHAM:

Q. You said a moment ago that if you had known those men were going to Cuba to fight the Spaniards you would nevertheless have taken them.

A. Of course I would.

Q. You would not have stopped to inquire whether it was against the laws of the United States or not, but you would have taken them anyhow?

A. Yes; I would have taken them. Of course, if I had known I would violate the law by it I would not have taken them.

The charter was not made through J. D. Hart & Company to Emil Nunez; I am sure of that. That charter-party was not made to Nunez or anybody representing the Cuban junta; that is a charter between my owners and J. D. Hart & Company.

Counsel for defendants offer in evidence the machetes identified by the witnesses.

Testimony closed.

63 *Defendants' Points.*

The learned judge is requested to charge the jury on behalf of the defendants as follows:

1. That it is not a crime or offense against the United States, under the neutrality laws of this country, for individuals to leave this country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.

2. That it is no offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunition, and munitions of war only run the risk of the capture and seizure of such arms and contraband of war by the foreign power against whom they are intended to be used; but this does not make it an offense against the laws of the United States, and for such cause the defendants cannot be held guilty.

3. That it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies and arms and munitions of war on the same ship; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not consti-
64 tute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty.

4. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country.

5. That before the jury can find the defendants guilty under this indictment they must first find that there was a "military expedition or enterprise" against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a

military organization of some kind designated as infantry, cavalry, or artillery, and officered and equipped for active hostile operations.

6. That if the jury find that there were transported on board of the "Horsa" arms and men, but the same were not a "military organizations as infantry, cavalry, or artillery, and officered and equipped, or in readiness to be officered and equipped," then the jury must find the defendants not guilty.

7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or
65 between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of capture of his property, and the other of the capture of his person by the foreign power, but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States and would not be liable under this indictment.

8. That if the jury find from the evidence in this case that the officers of the steamship "Horsa" took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and am-unition and manitions of war, but that the said men were not organized as infantry, cavalry, or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men, unarmed and not organized, either as infantry, cavalry, or artillery, and at the same time took on board boxes of am-unition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.

10. That even if the jury do find that the men taken on board were an organized military force with officers, as infantry,
66 cavalry, or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry, or artillery, constituting a military expedition or enterprise against the Kingdom of Spain.

11. That if the jury find from the evidence that the passengers and boxes of arms did not constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army and the said arms and ammunition were being conveyed to Cuba to be used by either army, then the jury are instructed that the defendants in transporting them in due course of their business committed no offense against the laws of the United States, and the jury are further instructed that all evidence of secrecy,

such as taking on the passengers and boxes of arms on the high seas and putting out the lights off the coast of Cuba, were acts which the defendants might lawfully do to avoid the capture of the passengers and the capture of the property from off their ship by Spanish men-of-war; but under such circumstances, if the jury find there was no military expedition or enterprise, such acts would not of themselves be evidence of any intent to violate the statute of the United States under which the defendants are indicted.

12. That if the jury find from the evidence that the steamship "Horsa" is a vessel sailing under a foreign flag and the defendants took on board the said steamship, off the coast of
67 New Jersey, on the high seas, a number of men without arms and equipments on their persons and at the same time took on board certain boxes of am-unition and munitions of war, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers and arms and am-unition were brought from the United States for the purpose of being transported on board the said steamship, and that the men intended, upon arrival in Cuba, to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.

13. That it is the duty of the Government to satisfy the jusry beyond a reasonable doubt that the men and arms and ammunition taken on board the steamship "Horsa" was a military expedition or enterprise from the United States against the Kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the Kingdom of Spain; and if the jury have from the testimony any reasonable doubt upon either of these questions or facts the jury will find the defendants not guilty.

The 12th point was withdrawn and substitution made as follows:

"If the jury find that when the defendants left Philadelphia and until after they had passed beyond the jurisdiction of the United States they were ignorant of the fact that they were to transport the men in question, with their arms and provisions, and find that the point off Barnegat where the men in question were taken aboard was beyond the jurisdiction of the United States—in other words, beyond the three-mile limit—and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty."

68 *Charge of the Court.*

GENTLEMEN OF THE JURY: The defendants having been at the time in question officers of the ship Horsa, the first as captain and the others as mates, are indicted jointly and separately, in which indictment it is charged that within the territory and jurisdiction of the United States they did organize and set on foot and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, the island of Cuba, the said island of Cuba being then and there the territory and dominions of the King

of Spain, the said United States being at peace with the said King, contrary to the act of Congress in such case made and provided.

The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, &c. To convict them you must be fully satisfied by the evidence that a military expedition was organized in this country to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it as before stated.

Thus you observe the case presents two questions: First, was such military expedition organized here in the United States? Secondly, did the defendants render the assistance stated here with knowledge of the facts.

69 In passing on the first question it is necessary to understand what constitutes a military expedition within the meaning of the statute. For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandize would not be important.

I have said more on this subject than the facts of this case require simply because of the numerous points presented by the defendants, on which the court is asked to charge. These

70 points I will now dispose of. The court is asked to say:

"1. It is not a crime or offense against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such person has an intent to enlist in foreign armies."

As a general proposition this is true, and the point is affirmed.

"2. It is no offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to

any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunitions, and munitions of war only runs the risk of capture, seizure, &c."

This is also true. No military expedition would exist in such case.

"3. It is no offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip; that in such case the per-ons transported and the shipper and the transporter of the arms and munitions of war only takes the risk," &c.

This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized and yet intended when they reached Cuba to
71 join the insurgent army and thus enlist in its service and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country for such a purpose would be an offense against the statute.

The fourth, fifth, sixth, seventh, eighth, and ninth points are fully answered by what has been said.

"10. Even if the jury do find that the men taken on board were an organized military force with officers, as infantry, cavalry, or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry, or artillery, constituting a military expedition or enterprise against the Kingdom of Spain."

As before stated, to justify conviction of the defendants the jury must be fully satisfied that the defendants knew that the men constituted a military expedition such as I have described.

The eleventh point has been fully answered by what the court has said.

The twelfth point is a very important point and is as follows:

"12. If the jury find that when the defendants left Philadelphia and until after they had passed beyond the jurisdiction of the United States they were ignorant of the fact that they were to transport the men in question with their arms and pro-
72 visions, and find that the point off Barnegat, where the men in question were taken aboard, was beyond the jurisdiction of the United States—in other words, beyond the three-mile limit—and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty.

This point raises the question whether the defendants committed an offense against the statute if the only aid which they furnished the expedition was furnished out at sea, beyond the jurisdiction of this country, and I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offense, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true and

the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted.

If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat.

"13. It is the duty of the Government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken aboard the steamship Horsa was a military expedition
73 or enterprise from the United States against the Kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the Kingdom of Spain, and if the jury have from the testimony any reasonable doubt upon either of these questions of fact the jury will find the defendants not guilty."

This point is affirmed. I trust the jury understand it. To convict the defendants it is necessary that the Government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty.

Now, did the men taken on board the Horsa off Barnegat constitute a military expedition? In other words, had they combined, organized, and armed themselves to go to Cuba and there make war on its government? A rebellion is, and was at the time, in progress in that country. The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition. When the vessel reached the coast of Cuba they lowered boats, which had been taken along on their account and for their use, got
74 into them with their arms, ammunition, and other provisions, and left the ship, which had undertaken to tow them some distance further, but was frightened off by the appearance of a light which was supposed to be that of a Spanish man-of-war.

That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only.

If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendant- without going further. If, on the other hand, you find

that it was a military expedition intended to make war against the government of Cuba, then you must pass upon the second question stated, to wit, Did the defendants, with knowledge of the fact, aid in carrying out its purpose of going to Cuba? They transported the men with their arms, ammunition, and provisions. Did they enter upon this service here with knowledge of the fact that the men constituted a military expedition, to fight against the government of Cuba?

I will not dwell on the evidence relating to this question. It has been very fully stated and commented upon by counsel. You will consider the circumstances under which the defendants started from this port, taking extra boats, clearing for Port Antonio, Jamaica, turning off of their course at the breakwater (at the mouth of the Delaware), going to Barnegat, and there taking a
75 large body of men with arms concealed in boxes, and provisions on board, together with two additional boats, under orders to put the men off with their boats, arms, and provisions where they might request. The defendants took them down to the coast of Cuba, extinguishing all lights about the ship as she approached, and there launched the boats and set the men with their arms and provisions adrift to reach the shore somewhere, abandoning the undertaking to tow them further down, and hurrying away because of the appearance of a supposed Spanish man-of-war.

Thus you see what the defendants did. From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country.

The question, therefore, is, Did the defendants understand they were to carry this expedition, and had provided for it and understand what the expedition was before leaving here? As you have seen, they took on two extra boats before starting and cleared for Port Antonio, Jamaica, and turned off of their course at the breakwater (the captain explaining this, to which explanation you will give whatever weight you deem it to be worth). When the
76 men came to the ship off of Barnegat there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise. It was then manifest that the services required was to carry men and arms to Cuba (the captain says he then so understood it), a most hazardous undertaking. Is it probable that the defendants would have risked themselves and their ship in this service if they had not been prepared for it by previous arrangement, and have done it without demurring or hesitating? Again, is it likely that those in charge of the expedition would have risked bringing the men and the property to that point on the mere chance that the defendant would take the risk of carrying them and the property to Cuba without arranging for it before-

hand? If the defendants had refused, as it was their right to refuse, and it would seem certain or at least extremely probable that they would refuse this most hazardous service if previous arrangement had not been made, what would have been the situation of the men and the property? The expedition would have failed. The men would have been subject to arrest and the property to sacrifice. Is it probable that those in charge of such an enterprise would take the men and property to this point without having secured certain means of transportation for it in advance? The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do.

77 I now submit the case to you, reminding you of its importance. If the evidence of the defendants' guilt is not entirely clear, they should be acquitted. If it is thus clear, they should certainly be convicted. No sympathy or prejudice must be allowed to influence your minds in passing on this case. We have nothing to do with the controversies between the people of Cuba and the government of that island. We are concerned only with the execution of the law in this case. We have only to consider whether the statute to which your attention has been called has been violated. It is our duty to see that the law is honestly and justly executed; that is all. The peace and safety of the community so manifestly depend upon the faithful and honest administration of the law that no man can fail to see it. We are suffering today as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law.

You will take the case and decide it with a careful regard to the rights of the defendants.

78 *Defendants' Exceptions to the Charge.*

Counsel for defendants except to that part of the charge of the court giving the definition of a military expedition.

To the refusal of the court to read the points that were not read to the jury.

To the refusal of the court to affirm all the points without qualification.

To the refusal of the court to affirm each point without qualification.

To the statement of the court that in its opinion this was a military expedition.

To the statement of the court that the men were armed.

To the failure of the court to comment on the evidence on behalf of the defendants.

To the statement of the court in reference to the reasons, motives, purposes, and acts of the defendants.

To the statement of the court that the defendants did not express surprise that the men came on the vessel off Barnegat.

To the statement of the court that the declarations of the men on the ship to the witnesses for the Government were evidence against the defendants.

To the statement of the court that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the three-mile limit, that constituted an offense against the laws of the United States.

To the statement of the court that the acts and declarations of the Cubans themselves *was* evidence against them all as to the nature of the expedition.

79 And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this seventeenth day of March, A. D. 1896.

WM. BUTLER. [SEAL.]

Agreed to.

ELLERY P. INGHAM,
U. S. Attorney.

And afterwards, on the same day, the defendants aforesaid, by their counsel aforesaid, present for filing an assignment of errors, and the same, being filed among the records of the court here, is in the words and figures following, to wit:

80 *Assignments of Error.*

1. The court below erred in overruling the objection of the defendants to the testimony of Frederick C. Lee, given in the form of questions and answers, and admitting as evidence the said testimony of the said Frederick C. Lee, who was a witness for the prosecution and who was engineer on the steam-lighter Stranahan, the said testimony being in relation to a conversation on the Stranahan between the witness and two persons who had been taken off the tug Cham by the Stranahan and were being conveyed by the Stranahan to the defendants' ship Horsa, the questions, answers, and testimony being as follows:

Q. Did you have a conversation with some of these young men you took off of the Cham, and they told you they were Cubans?

A. Yes, sir.

Q. Did they tell you where they were going?

(Objected to as to anything that was said or took place on the boat in the absence of the defendants.)

(Objection overruled. Exception by defendants.)

A. Yes; there were two young men in the engine-room there with me, and I asked them where they were going and they told me they were going to Cuba.

2. The court below erred in overruling the objection of the defendants to the testimony of Carl Arnston, a witness for the prosecution, who was a fireman on the defendants' steamer Horsa, the said testimony being in relation to a conversation on the steamer Horsa, after leaving Barnagat and during the course of the voyage, between the witness and one of the persons on board the
81 Horsa, the questions, answers, and testimony being as follows:

Q. Did you have any talk with any of these men?

(Objected to unless it was in the presence of these defendants. Objection overruled. Exception by defendants.)

Q. You say you had a conversation with them?

A. Yes, sir.

Q. Tell us what they told you.

A. I was going in the forecastle one night, and he told us, "I go down to Cuba to fight."

Q. To fight who?

A. The Spanish.

Q. How many men did you talk with?

A. Only one.

3. The court below erred in charging the jury as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government and have provided themselves with the means of doing so. I say provided themselves with the means of doing so, because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not be decided in this case. I will say, however, to counsel that
82 were that question required to be decided I should hold that it is not necessary nor is it important that they intended to make war as an independent body or in connection with others."

4. The court below erred in not reading to the jury all of the defendants' third point and erred in not affirming the said point, the said point being as follows:

"3. That it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies and arms and munitions of war on the same ship; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty."

The answer to the said point being as follows:

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country for such a purpose would be an offense against the statute."

5 The court below erred in not reading to the jury and neither affirming -or refusing the defendants' fourth point, which is as follows:

"4. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or
83 forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country."

6. The court below erred in not reading to the jury and neither affirming -or refusing the defendants' fifth point, which is as follows:

"5. That before the jury can find the defendants guilty under this indictment they must first find that there was a "military expedition or enterprise" against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry, or artillery and officered and equipped for active hostile operations."

7. The court below erred in not reading to the jury and either affirming or refusing the defendants' sixth point, which is as follows:

"That if the jury find that there were transported on board of the Horsa arms and men, but the same were not a military organization, as infantry, cavalry, or artillery, and officered and equipped or in readiness to be officered and equipped, then the jury must find the defendants not guilty."

8. The court below erred in not reading to the jury and either affirming or refusing the defendants' seventh point, which is as follows:

84 "7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country. In such cases the shipper and volunteer would run the risk—the one of capture of his property and the other of the capture of his person—by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States and would not be liable under this indictment."

9. The court below erred in not reading to the jury and either affirming or refusing the defendants' eighth point, which is as follows:

"8. That if the jury find from the evidence in this case that the officers of the steamship Horsa took on board off the coast of New Jersey on the high seas a number of men all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and munitions of war, but that the said men were not organized as infantry, cavalry, or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army."

10. The court below erred in not reading to the jury and either affirming or refusing the defendants' ninth point, which is as follows:

85 "9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men unarmed and not organized either as infantry, cavalry, or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army."

11. The court below erred in charging the jury, in answer to the defendants' twelfth point, as follows:

"I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offense and must consequently be acquitted. They allege that the point off Barnegat, where the men were taken on board, was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted. If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat."

12. The court below erred in charging the jury as follows:

"The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body, and appeared to be acting in concert, under an organization or
85½ understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition."

13. The court below erred in charging the jury as follows:

"That this was a military expedition, designed to make war against the government of Spain, would seem to the court to be free from reasonable doubt."

14. The court below erred in charging the jury as follows:

"Thus you see what the defendants did. From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its object were and had arranged and provided for its transportation when they left Philadelphia, or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being, according to the testimony, beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country. The question, therefore, is, Did the defendants understand they were to carry this expedition and had provided for it, and understand what the expedition was before leaving here? As you have seen, they took on two extra boats before starting, and cleared for Port Antonio, and turned
86 off of their course at the breakwater, the captain explaining this, to which explanation you will give whatever weight you deem it to be worth."

15. The court below erred in charging the jury as follows:

"The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of and provision for what they were about to do."

16. The court below erred in charging the jury as follows:

"We are suffering today, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law."

17. The court below erred in overruling the defendants' motion in arrest of judgment and the reasons therefor, which reasons are as follow:

"1. Because this court has no jurisdiction over these defendants, or to pass or impose sentence upon these defendants.

"2. Because although the indictment charges that these defendants committed an indictable offense within the jurisdiction of this court, yet the uncontradicted testimony shows that the defendants are subjects of the King of Denmark; that they were in charge of a

Danish vessel; that the men and boxes were taken on board the said vessel on the high seas, beyond the three-mile limit and beyond the jurisdiction of the courts of the United States of America, and no overt act or offense, as charged in the said indictment, was committed by the defendants, or either of them, within the jurisdiction of this court or any other court in the said United States of America, and therefore this court is without jurisdiction to try these defendants or to impose sentence upon them."

18. The court below erred in overruling the defendants' motion in arrest of judgment.

87 19. The court below erred in passing sentence upon the defendants.

20. The court below erred in sentencing the defendants to confinement in the penitentiary.

CHARLES L. BROWN,
WILLIAM W. KER,
Attorneys for Defendants.

88 And afterwards, to wit, on the eighteenth day — of the year of our Lord 1896, the defendants aforesaid, by their counsel aforesaid, file- among the records of the court here their petition for writ of error, with order of Honorable George Shiras, justice of the Supreme Court of the United States, allowing same and granting supersedeas and stay of proceedings and execution of sentence pending proceedings under writ of error, and the same are in the words and figures following, to wit:

89 In the Supreme Court of the United States.

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States:

The petition of J. H. S. Wiborg and Jens P. Petersen and Hans Johansen respectfully represents:

That they were indicted in the district court of the United States for the eastern district of Pennsylvania upon a bill of indictment of February sessions, 1896, No. 29, which said indictment was under section 5286 of the Revised Statutes of the United States, and charged that your petitioners unlawfully provided the means for a military expedition from the United States to the island of Cuba against the government of the King of Spain, with whom the United States is at peace.

That on February 25th, 1896, your petitioners were arraigned upon the said indictment in the said court and pleaded that they were not guilty of the said charge contained in the said indictment, and thereupon a jury was called and empanelled, and your petitioners were tried before the said jury, and on February 25th, 1896, the said jury rendered a verdict of "guilty."

That at the said trial the evidence showed that your petitioners are subjects of the King of Denmark; that the steamship Horsa was a ship sailing under the Danish flag; that your petitioner, J. H. S.

Wiborg, was the master of the said steamship; that your petitioners, Jens P. Petersen and Hans Johansen, were the mates of the
89½ said steamship; that the said steamship was under charter to a firm in Philadelphia; that on November 9th, 1895, your petitioners sailed on the said steamship under the said charter from the port of Philadelphia, bound for the island of Jamaica; that on November 10th, 1895, thirty-nine men and about forty-three boxes and two life-boats were taken on board the said steamship; that the said men and boxes and life-boats were taken on board the said steamship on the high seas, off the coast of New Jersey, and beyond the three-mile limit, and were taken on board by order of the charterer of the vessel, and with directions to the master of the vessel to let the men off at any place designated by the bearer of the order; that the said thirty-nine men were without arms or equipments or apparent organization, but it was afterward found that some of the boxes contained arms and ammunition; that the said steamship proceeded on her voyage to Jamaica, carrying the said men and boxes; that on the high seas and a number of miles off the coast of Cuba the said men disembarked from the said steamship on the said boats, taking with them the said boxes and some arms and ammunition that had been taken from some of the said boxes; that when the said men and boxes were taken on board the said steamship your petitioners were acting under orders from the charterer of the vessel and were ignorant that the men and boxes formed a military expedition or intended to form a military expedition; that there was no evidence that the men and boxes were going to Cuba, excepting from conversations held between three of the said men and some of the firemen on the said steamship, in which the men stated they were going to Cuba to fight the Spanish, but the said conversa-
90 tions were not in the presence of your petitioners and were not made known to your petitioners, and were wrongfully admitted as evidence against your petitioners; that the said men and boxes and boats were taken on board the said steamship on the high seas and were carried on the high seas to near the island of Cuba, where the said men disembarked as aforesaid; that the said men and boxes were not within the jurisdiction of the United States or any of the courts thereof, and that there is or was no evidence whatever that the said men and boxes and boats ever went to the island of Cuba or landed upon said island.

That at the said trial the learned judge was requested to charge the jury that the taking on of the said men and boxes was not an offense committed by your petitioners against the laws of the United States, and that the said court was without jurisdiction, but the learned judge charged the jury that the said taking on of the said men and boxes was an offense against the laws of the United States, and that the said court had jurisdiction, and refused to charge the jury upon the law as requested on behalf of your petitioners, and decided that although the said steamship was sailing under the Danish flag, yet the jurisdiction of the said court extended over the said vessel upon the high seas.

That exceptions were taken to the ruling of the court in the ad-

mission of the said evidence against your petitioners and to the charge and decision of the learned judge upon the law as aforesaid, and a bill of exceptions has been presented to and signed and sealed by the learned judge and filed of record in the said court.

That a motion for a new trial was made by and on behalf of your petitioners, assigning as reasons therefor the error on the part of the court in admitting the said testimony, and in the charge of the court to the jury, and in the decision of the court that the
91 said court had jurisdiction, which motion for a new trial has been argued and the court has refused the same; that at the same time a motion in arrest of judgment was filed by and on behalf of your petitioners, assigning as reasons therefor that the said court was without jurisdiction to try and sentence your petitioners, which motion in arrest of judgment has been argued and has been refused.

That on the 17th day of March, A. D. 1896, your petitioners were sentenced by the said court, the sentence being that your petitioner, J. H. S. Wiborg, shall pay a fine of three hundred dollars and be confined in the penitentiary for the eastern district of Pennsylvania for the term of one year and four months, and that your petitioners, Jens P. Petersen and Hans Johansen, shall each pay a fine of one hundred dollars and be confined in the said penitentiary for the period of one year.

That assignments of error have been filed with the clerk of the said district court of the United States in accordance with the rules of the Supreme Court of the United States.

Your petitioners further represent that the said court erred in assuming jurisdiction over your petitioners and the said steamship, and in the admission of evidence aforesaid, and in the charge of the court to the jury as set forth in the said assignments of error, and in sentencing your petitioners to infamous punishment in the said penitentiary.

Wherefore your petitioners pray that a writ of error may be allowed in the premises, directed to the district court of the United States for the eastern district of Pennsylvania, and that a citation be issued, returnable within thirty days, upon the entry of security in whatever sum may be directed; that a supersedeas may be
92 granted and a stay of execution of proceedings in the court below pending such writ of error or appeal, and that your petitioners be admitted to bail upon giving bonds in such sum as the district judge for the eastern district of Pennsylvania may direct.

And they will ever pray, &c.

J. H. S. WIBORG,
JENS P. PETERSEN,
HANS JOHANSEN,
By CHARLES L. BROWN,
WILLIAM W. KER, *Counsel.*

93 And now, to wit, the 18th day of March, A. D. 1896, the petition of J. H. S. Wiborg and Jens P. Petersen and Hans Johansen, praying for a writ of error to the district court of the

United States for the eastern district of Pennsylvania, having been read and considered, and the rules of this court having been complied with as to the filing with the court below assignments of error, it is ordered that a writ of error be allowed, and that a citation do issue, addressed as prayed for, returnable within thirty days hereafter, upon the entry of security in the sum of $250; that a supersedeas be granted and a stay of proceedings and execution of sentence imposed by the court below pending this writ of error, and that the said petitioners, J. H. S. Wiborg and Jens P. Petersen and Hans Johansen, be admitted to bail upon giving bond in such sum as the district judge for the eastern district of Pennsylvania shall direct.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

94 Know all men by these presents that we, J. H. S. Wiborg and Jens P. Peterson and Hans Johansen, as principals, and Robert J. Barr, of Philadelphia, as sureties, are held and firmly bound unto The United States of America in the full and just sum of two hundred and fifty dollars, to be paid to the said United States of America, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventeenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of the district court of the United States for the eastern district of Pennsylvania, in the month of February, A. D. 1896, in a suit depending in said court between The United States of America, plaintiff, and the said J. H. S. Wiborg and Jens P. Petersen and Hans Johansen, defendants in a certain bill of indictment of February sessions, 1896, No. 29, upon which issue was joined and a trial had before Hon. William Butler, judge of said court, and a jury called and impanelled in said case, and such proceedings there had that on the 28th day of February, A. D. 1896, a verdict of guilty was rendered against the said defendants, and the said J. H. S. Wiborg was sentenced to pay a fine of three hundred dollars and be imprisoned in the penitentiary for the eastern district of Pennsylvania for fourteen months, and the said Jens P. Petersen and Hans Johansen were each sentenced to pay a fine of one hundred dollars and be imprisoned in said penitentiary for one year, and the said defendants considering that manifest errors have happened in said trial to their great prejudice, having presented their petition for a writ of error to the Honorable George Shiras, Jr., of the Supreme Court, and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the verdict in the aforesaid suit, and a citation directed to the said clerk of the United States district court for the eastern district of Pennsylvania, citing and admonishing him to return the record, so that it be and appear at a Supreme Court of the United States to be holden at Washington within thirty days:

Now, the condition of the above obligation is such that if the said

J. H. S. Wiborg and Jens P. Petersen and Hans Johansen shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. H. S. WIBORG. [SEAL.]
JENS P. PETERSEN. [SEAL.]
HANS JOHANSEN. [SEAL.]
ROBERT J. BARR. [SEAL.]

Sealed and delivered in presence of, interlined before signing—
THOS. MARPLE.
FRANK T. GROGAN.

Approved by—
GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

95 STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

Robert J. Barr, being duly sworn according to law, deposes and says: I am the owner of real estate, consisting of eight houses, situate in the city of Philadelphia, which houses are assessed for taxation at one thousand dollars each and are of great value beyond that sum; the title to the said houses is in my own name, and they are free from all estates, liens, and encumbrances, and there is no judgment against me.

ROBERT J. BARR.

Sworn to and subscribed before me this 17th day of March, A. D. 1896.

[SEAL.] CHARLES L. BROWN,
Notary Public for the Commonwealth of Penna., Residing in Philadelphia.

96 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES *vs.* JACOB H. S. WIBORG. } Indictment. No. 29, Feb'y Sessions, 1896.

And now, March 18th, 1896, a writ of error having been allowed in the above case by Honorable George Shiras, Jr., justice of the Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error—

It is by this court ordered that upon the execution of a bond, with surety in three thousand dollars, for his appearance upon the determination of the proceedings on the writ of error, that the defend-

ant be forthwith released from imprisonment and discharged from the custody of the warden of the Eastern penitentiary of the Commonwealth of Pennsylvania.

97 Whereupon Robert J. Barr comes and offer*ing* himself as bail for the defendant's appearance, and, the district attorney being satisfied with his sufficiency as bail, the clerk is authorized to take the recognizance of the said defendant, Jacob H. S. Wiborg, with the said Robert J. Barr as surety in three thousand dollars for the defendant's appearance upon the determination of the proceedings on the writ of error or within five days thereafter.

And the same day, it appearing that the said bond, with surety, had been executed, the defendant is discharged from present custody under the sentence entered on the 17th March, 1896.

98 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES *vs.* JENS P. PETERSON. } Indictment. No. 29, Feb'y Sessions, 1896.

And now, March 18th, 1896, a writ of error having been allowed in the above case by Honorable George Shiras, Jr., justice of the Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error—

It is by this court ordered that upon the execution of a bond, with surety in fifteen hundred dollars for his appearance upon the determination of the proceedings on the writ of error, that the defendant be forthwith released from imprisonment and discharged from the custody of the warden of the Eastern penitentiary of the Commonwealth of Pennsylvania.

99 Whereupon Robert J. Barr comes and offer*ing* himself as bail for the defendant's appearance, and, the district attorney being satisfied with his sufficiency as bail, the clerk is authorized to take the recognizance of the said defendant, Jens S. Peterson, with the said Robert J. Barr as surety in fifteen hundred dollars for the defendant's appearance upon the determination of the proceedings on the writ of error or within five days thereafter.

And the same day, it appearing that the said bond, with surety, had been executed, the defendant is discharged from present custody under the sentence entered on the 17th March, 1896.

100 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES *vs.* HANS JOHANSEN. } Indictment. No. 29, Feb'y Sessions, 1896.

And now, March 18th, 1896, a writ of error having been allowed in the above case by Honorable George Shiras, Jr., justice of the

Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error—

It is by this court ordered that upon the execution of a bond, with surety in fifteen hundred dollars for his appearance upon the determination of the proceedings on the writ of error, that the defendant be forthwith released from imprisonment and discharged from the custody of the warden of the Eastern penitentiary of the Commonwealth of Pennsylvania.

Whereupon Robert J. Barr comes and offer*ing* himself as
101 bail for the defendant's appearance, and, the district attorney being satisfied with his sufficiency as bail, the clerk is authorized to take the recognizance of the said defendant, Hans Johansen, with the said Robert J. Barr as surety in fifteen hundred dollars for the defendant's appearance upon the determination of the proceedings on the writ or error or within five days thereafter.

And the same day, it appearing that the said bond, with surety, had been executed, the defendant is discharged from present custody under the sentence entered on the 17th March, 1896.

102 UNITED STATES, }
Eastern District of Pennsylvania, } *ss:*

We, Jacob H. S. Wiborg, residing — Copenhagen, Denmark, and Robert J. Barr, residing — No. 4241 Main street, Manayunk, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of three thousand dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Jacob H. S. Wiborg, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

J. P. H. WIBORG. [L. S.]
ROB'T J. BARR. [L. S.]

Taken, acknowledged, and subscribed this 18th day of March, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

103 UNITED STATES, } ss:
Eastern District of Pennsylvania, }

We, Jens P. Peterson, residing — Aarkus, Denmark, & Robert J. Barr, residing — No. 4241 Main street, Manayunk, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of fifteen hundred dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Jens P. Petersen, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

J. P. PETERSON. [L. S.]
ROB'T J. BARR. [L. S.]

Taken, acknowledged, and subscribed this 18th day of March, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

104 UNITED STATES, } ss:
Eastern District of Pennsylvania, }

We, Hans Johansen, residing — Bergen, Norway, and Robert J. Barr, residing — No. 4241 Main street, Manayunk, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of fifteen hundred dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Hans Johansen, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

H. JOHANSEN. [L. S.]
ROB'T J. BARR. [L. S.]

Taken, acknowledged, and subscribed this 18th day of March, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

105 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *sct:*

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the foregoing is a true and faithful copy of the record and proceedings in the said court in a certain criminal cause therein lately depending, to wit, indictment, No. 29, February sessions, 1896, "The United States of America against J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen," defendants, as full and entire as the same now remain among the records of the said court in my office, with copy of petition for writ of error, of the assignments of errors, and of the bond on writ of error.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this 10th day of April, in the year of our Lord one thousand eight hundred and ninety-six, and in the 120th year of the Independence of the United States.

[SEAL.]

WM. W. CRAIG,
Dep'ty Clerk, District Court U. S.

106 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

106½ [Endorsed:] No. 29. February sess., 1896. Of indictments. District court U. States, eastern district of Penna. The United States *vs.* J. H. S. Wiborg, Jens P. Petersen, & Hans Johansen. Indictment. No. 29. Feb'y sess., 1896. Citation on writ of error and acceptance of service. Lodged in the clerk's office March 18th, 1896, at 4 p. m.

Service accepted March 18th, 1896.

ELLERY P. INGHAM, *U. S. Att'y.*

107 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

108 [Endorsed:] No. 29. February sess., 1896. Of indictments. District court U. States, eastern district of Penna. The United States *vs.* J. H. S. Wiborg, Jens P. Peterson, & Hans Johansen. Indictment. No. 29. Feb'y sess., 1896. Writ of error from the Supreme Court of the United States. Lodged in the clerk's office March 18th, 1896, at 4 p. m.

[Endorsed:] District court United States, eastern dist. of Penna. The United States *vs.* J. H. S. Wiborg, Jens P. Petersen, & Hans Johansen. Indictment. No. 29. Feb'y sess., 1896. Transcript of record of the district court, with writ of error & citation.

Endorsed on cover: Case No. 16,276. E. Pennsylvania D. C. U. S. Term No., 986. J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen, plaintiffs in error, *vs.* The United States. Filed May 1st, 1896.

Office Supreme Court U. S.
FILED.
MAY 18 1896
JAMES H. MCKENNEY,
CLERK.

CHARGE OF JUDGE BROWN

IN

UNITED STATES

vs.

JOHN D. HART ET AL.

AND

CHARGE OF JUDGE BRAWLEY

IN

UNITED STATES vs. HUGHES.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Before Hon. Addison Brown, J., and a Jury.

UNITED STATES

vs.

JOHN D. HART, SAMUEL HUGHES, BENJAMIN GUERRA, BERNARDO BUENO, and LAWRENCE BRABAZON.

NEW YORK, *April* 10, 1896.

Charge.

BROWN, *J.*:

GENTLEMEN OF THE JURY: The object of the neutrality laws is mainly to prevent complications between this Government and foreign powers. They were designed to pre-

vent such complications by making criminal such acts as tend to embroil us with other nations; and in part, also, to assert, as history shows, our own sovereignty over military enlistments attempted to be procured on our own soil.

Within five years after the adoption of the Constitution, so long ago as 1794, these enactments were found necessary; and the law then passed is substantially the same as it exists today. In 1818 it was revised by a few changes of words here and there, not affecting the section under which this indictment has been framed. In the Revised Statutes of the United States adopted in 1874, the same provisions were incorporated and are now referred to by sections under the latter act.

Section 5282 deals with individual enlistments. Section 5286 deals with military expeditions. Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with which we are at peace. Section 5282 prohibits any person from enlisting in this country as a soldier in the service of any foreign power. It also prohibits any person from hiring or retaining any other person to enlist, or to go abroad for the purpose of enlisting. But it does not prohibit any person, whether citizen or not, from going abroad for the purpose of enlisting in a foreign army. By our very legislation on this subject therefore, as apparent from this statute, our law permits individuals to go to foreign countries to enlist. I consider that important in this case, in its bearing upon the construction of section 5286, which was a part of the same original act. I say the law as thus framed cannot be construed otherwise than as designedly leaving the field open for all persons within our

jurisdiction, whether citizens or not, to go to foreign states to enlist in their armies, if they choose to do so. As this is lawful for one man, so it is lawful for ten men or for twenty or a hundred men. It is a necessary incident to this lawful right, that men may go abroad for this purpose in any way they see fit: either as passengers by a regular line steamer, or by chartering a steamer, or in any other manner they choose, either separately or associated; so long as they do not go as a military expedition, nor set on foot a military enterprise, which section 5286 prohibits.

We have, therefore, to consider these two sections together. It is a military expedition alone that is prohibited by section 5286. The language of the act is that "every person who within the jurisdiction of the United States begins, or sets on foot, or provides or procures the means for, any military expedition or enterprise to be carried on from thence," that is, from this country, "against any foreign prince," and so on, "shall be guilty of a high misdemeanor." While, therefore, the right of individuals to go abroad for the purpose of enlistment is undoubted, they must not go as a military expedition: they must not form, nor begin, nor set on foot, any military expedition to be carried on from this country, nor furnish or procure means therefor.

These five defendants are indicted under section 5286; and they are now on trial before you on the contention of the Government that they have either set on foot such a military expedition by forming a part of it, or that they have provided or procured the means for it. Here the question then is,—and it is the principal question you have to decide—Was this enterprise, in which some 60 men are shown to have embarked on the Bermuda, besides about 40

others who, it is alleged, were designed to embark—was this enterprise designed merely for the transportation of these men peaceably to Cuba, as individuals who wished and intended to enlist in the insurgent army on arrival there, and who, it may be, had promised to do so, but without any military organization here, or any intended military organization before enlistment in Cuba, and without any intended employment of military force in reaching the Cuban army; or, on the other hand, was the embarkation of these men on the Bermuda the beginning of a military expedition to be carried on from this country against Spain?

What, then, is a military expedition, as distinguished from a non-military transportation of persons for enlistment abroad? The term "expedition" signifies a journey or voyage by a body of men for some definite purpose. There are various kinds of expeditions. We have had expeditions of exploration, like Wilkes' expedition, Fremont's expedition, Greely's expedition and Peary's expedition; and so there have been many military expeditions. We speak of Xerxes' expedition into Greece. A military expedition, therefore, is an undertaking by a body of men of a military character. There must be a body, because one or two men cannot constitute an expedition. To fall within the statute, it must be a military expedition "carried on from this country." A mere lawful intent to enlist abroad cannot give a voyage a military character. The expedition must be military in character, as is admitted; and I cannot conceive how an expedition can be characterized as military, or be deemed to be "carried on" as a military expedition "from this country" within the language of the statute unless it

have some at least of the essential elements of a military body when it starts.

The essential elements of a military body are, first, soldiers, as is indicated by the very word "military," derived from *miles*, a soldier. The fundamental idea of a military enterprise or expedition to be "carried on" from this country is that it is undertaken by soldiers or in some military service. Next is the relation of the soldier to the commander. It imports officers, and the duty of military obedience. Next arms; such arms as are appropriate to the enterprise; such as will enable the body to do the military work contemplated. Next, that it shall act as a unit in a military way, *i. e.*, as a body bound together by organization under a definite command. And, finally, a military purpose, a purpose of attack or defense, a hostile purpose.

Now, here was an enterprise of some kind to transport men by the Bermuda,—to take them somewhere. A part went on board. Others, there is strong evidence to show, intended to go on board, but did not, because they were intercepted before they had embarked.

For the present, I will assume that you find that the destination of all these men was the Cuban insurgent army. But if you find that they were designed to be taken there, or that they wished to go there, do you find in this undertaking beyond reasonable doubt any of the essential elements of a military expedition. I do not say that in order to constitute a military expedition to be "carried on from this country" as the statute reads, it must be complete at the start, or possess all the elements of a military body. It is sufficient if there was a combination by the men for that purpose, with the agreement and the intention of the body

that embarks that it should become a military body before reaching the scene of action. Such a combination and agreement, if means for effecting it were provided, followed by embarkation in pursuance of the agreement, would show such a partial execution of the design on our soil, as to bring the case within our statute, as "a military enterprise begun and carried on from the United States."

If, however, the expedition or enterprise was designed only to transport munitions of war as merchandise to Cuba, though for the use of the insurgent army, and at the same time to transport a body of men as individuals to Cuba, who wished to enlist there, and that was all, then it was not a military expedition or enterprise under this statute: it would not be so unless the men had first combined or agreed to act together as a military force, or contemplated the exercise of military force in order to reach the insurgent army. In that case, I should regard it as a military expedition, for the reason that they had prepared for and intended to exercise military force in getting to the insurgent army, or landing in Cuba.

The question then for you upon the facts is whether there is sufficient evidence in what has been produced before you, mostly circumstantial, to show beyond reasonable doubt that there did exist the design of making this body of men who were leaving upon the Bermuda, a military force, or whether they contemplated, as a body, any military action; or, whether they had already enlisted here in the Cuban army. If they had done the latter, if they had enrolled themselves as members of the Cuban army, and had thus become members of that body, agreeing already to act together as such, and the transportation of these men was

under such an enrollment and agreement, I think that would be setting on foot a military expedition here.

Almost all the evidence in the case is indirect. But you must remember that it is natural that this should be so. Inasmuch as it is legal and lawful for men and munitions of war to be transported to the scene of belligerent operations, those who are engaged in it run the risk of capture, of being sunk in the operation; and there is a necessity on their part, while doing an act which is lawful so far as this country is concerned—there is a necessity, I say, that they should protect themselves by every reasonable means against surprise. There is nothing, therefore, out of character in such an expedition, though it be a lawful one here, that it should be secret, or that there should be an air of mystery about it, or that it should be conducted as secretly as possible. It would be the same if it were unlawful. Secrecy and indirection are, therefore, wholly inconclusive circumstances. They are as consistent with a lawful expedition designed to transport men peaceably to Cuba for the simple purpose of enlistment there, as they are with the existence of a hostile expedition. Thus all the circumstances that attend such an enterprise make it difficult for the Government to prove its charge. This is inherent in the nature of the case, because of the necessity that exists even for a lawful expedition, such as I have described, to work in secrecy.

In passing, I may observe in regard to the clearing of the Bermuda for Santa Martha, and the false oath which seems to have been made by the master a few hours before this seizure, that that false oath is equally inconclusive. That is a separate offense, not on trial here; and it was an act evidently done for the same purpose of keeping secret the

taking of passengers, and the nature of the intended cargo, in case you find the vessel was destined to carry the arms and men to Cuba. It was an incident, therefore, of the same kind as all the other secret means taken to prevent the knowledge of the expedition from reaching the Spanish authorities and thus subjecting the expedition to greater danger.

I shall not go over the various circumstances in the case upon which reliance is placed to lead you to a conviction that there was a military expedition. If I have made myself understood, I think you appreciate sufficiently what the court understands to be a military expedition, as distinguished from a peaceful and a lawful one. I only repeat that while it is not necessary in my judgment that all the elements of a military expedition—soldiers, officers, a military organization, arms and equipments, should exist or be supplied at the time when the vessel sails, it is necessary that there should be a combination for those purposes: that these should have been within the understanding and intent of the parties and that some of these things should be consummated here. The most essential thing would seem to be a combination for some kind of military organization, some enrollment, some enlistment, or some agreement which bound the men to act together as a body for military service. If this agreement existed, other things might be supplied afterwards before the scene of action was reached.

In the present case these men as a body were not armed, as appears to the court, in any such manner as would be effective, nor as would be probable, in case they were designed for military service before they reached Cuba. A few side arms, a pistol and a belt for a few men, or a sword

and belt for a small portion of the men, do not constitute such an arming of a body of men as you would expect in case that body was designed to act as a military force.

A good deal of stress is laid upon the evidence of enrollment. It is for you to judge what interpretation you shall give to the circumstances that have been proved in that regard. I think there is only one witness, Del Villar, and only one piece of evidence in the whole case, that tends to show any military combination. He says that when he first went to Garcia, after a few moments conversation Garcia said he did not want him. On a second visit, after some five or ten minutes, he finally said he would take him, and that the witness signed a paper with other names upon it, at Garcia's request. When the witness was called on the second day, changing somewhat the testimony which he gave on the first day, he said that other men were there who signed the paper and that the paper was pointed out on the table by the other men who told him to sign it; the first day he said Garcia told him to sign it, and he did so. The first day he said he did not know what the paper was, except that there were two or three leaves containing names after the heading; that he did not know what the heading was, and did not read it. On the last day, he says he recalls that he saw the words in the heading, "Soldiers incorporated in the city of New York for the independence of Cuba;" and that although the heading was in writing, about three inches long on the page, he did not read the rest of it, and did not try to read it, nor was it read aloud. It is unfortunate that we have nothing more of this heading. It is always dangerous to judge by a small part of a written instrument. How can we tell what the other provisions were, or what

qualifications were placed upon the words quoted, or what agreement there was by the men signing it, if there was any agreement? The court was in doubt, for that reason, whether this piece of testimony should be admitted at all. If, however, you interpret the words quoted by what Del Villar says he did, by what he understood, and by what he says he expected to do, you would apparently find some qualification of what these words quoted might import. On cross-examination he says that what he expected to do was to go to Cuba to enlist in the Cuban army. If that is correct, it would indicate that he did not understand that he was enlisted in the Cuban army here. Again, from his actions and conduct, and from the way he testifies, there does not seem to have been any understanding on his part that his signature put him under pay. Whether the heading said anything about pay, we do not know. The way he got money from Almazor seems accidental. He speaks of it as if he had not expected it, and as if there was no contract about it. He says that Hernandez, his friend at the same boarding-house, told him that some others were getting money from Almazor, and if he would go there he would get it; that he went there and got $5 twice before the Hawkins sailed; and that after the Hawkins was lost, and before the expedition on the Bermuda, he got $5 from Almazor for two or three of the last weeks.

Now it is for you to determine whether there was any enlistment of men for pay; whether what Del Villar says that he did, and what he expected to do, do not indicate rather what was the real purpose of this expedition. He had no conversation, and no agreement with any others of the men. There seems to be no evidence of any common

understanding except such as might be inferred from what he says about this paper, which he says quite a number signed; and the purpose of the paper may be inferred from what he says he did, and expected to do.

Whether there were officers or any relation of soldier and commander, there is almost an entire dearth of evidence. I do not recall any evidence to show that there was any officer whatsoever; not even that Garcia was an officer, or was connected with the insurgent army. If there was, you will give it its weight. Del Villar called himself "under the hand" of Almazor. Whether that was anything more than simply looking after certain men who had arranged to go to Cuba, you must judge. Almazor conducted Del Villar and six others to the Hawkins; and in like manner Del Villar took in charge seven men for the purpose of taking them down to the Atlantic basin, where the tug McCaldin Brothers received them on board for the purpose, as you may find, of embarking on the Bermuda. I think there is no other evidence of direction or command than what may be inferred from that. It is for you to say whether that imports any military command, or whether it is anything more than looking after a certain number of men who had signed their names as willing to go to Cuba and keeping track of them and getting them on board the proper vessels to go there when the time came.

In regard to the ammunition which was on board the Stranahan and which never reached the Bermuda, it is for you to draw your inferences, whether that was in fact designed for the Bermuda or not. If it was, then you are to consider whether the evidence indicates that it was to be transported peaceably as merchandise to Cuba, possibly for

the benefit of the insurgent army; or whether it was for the purpose of aiding in a hostile attack and invasion on the part of this body of men who were to embark on board the Bermuda or as part of a military enterprise. If you find that the circumstances warrant you in believing that the body of men who embarked and of those who intended to embark upon the Bermuda, were designed to constitute, or to act as a military body before they joined the insurgent army, the presence of arms on board the Bermuda, and the furnishing of them in some way would be extremely important. Proper arms would be a necessary adjunct and attendant on any such design on the part of the men embarking, unless they were to obtain arms from some other source; because, as I have said, in the condition in which they embarked they were not prepared, they were not equipped, they were not armed so as to be of any substantial use for military service. It is incredible that an expedition designed for any military service of its own should be sent out without other arms than what they had personally about them, unless a further supply of arms was planned.

On the other hand, if you find that there was no intention or design on the part of this embarking body to act as a military body, or to exercise any military force as a body in getting to Cuba, and if you find that they had not joined the Cuban army here, so as to become incorporated with it, and were not to be transported from here as a part of the insurgent army, then the presence of these munitions of war on the Bermuda would be unimportant.

I must advert briefly to some general rules of law applicable to your consideration of the evidence. I should first

say, however, that unless you find these defendants or some of them were a part of the body designed to be a military expedition, you cannot find them guilty unless you find not only that there was a military expedition, but that the defendants had knowledge of it, and assisted it.

The evidence as affecting Mr. Hart is that he was instrumental in the purchase of the Bermuda, ostensibly for the fruit trade, and that she cleared for a fruit port. He furnished some money in payment of the price of her, and Mr. Guerra furnished the larger part. Both of these men were on the tug that brought Garcia down to the Bermuda. If you find there was a military expedition, their association with Garcia—who, upon the evidence, must have been a chief instrument in planning and arranging it—and their presence with Garcia when he came down to the Bermuda that night, and when Hart went aboard, would be a pretty strong circumstance from which you might infer their acquaintance with his unlawful design, though that would not necessarily follow. I believe there is no other evidence than that single circumstance. It is for you to say whether that is sufficient. Neither Guerra nor Hart seem to have been in any other way identified with this body of men. If it was military in character, Guerra and Hart cannot be convicted unless they understood it; and unless the purchase of this vessel and the use of it for those men and for that purpose was known by them.

Brabazon and Bueno stated to the Government officers their knowledge that there was to be a transportation of men to Cuba for the insurgent army. Further than that I do not understand the testimony of Mr. Bagg to go upon

that point. Bueno designed to enlist there to fight in the Cuban army. Brabazon knew this general purpose.

In regard to all this evidence, how, upon weighing it, you are to act in view of any uncertainties you may feel, is governed by the maxim in criminal cases, that if there is a reasonable doubt on the whole evidence with regard to the guilt of the accused, you must give him the benefit of the doubt. You must be satisfied beyond a reasonable doubt of the guilt of the accused, and of the existence of those facts, and each of them, which you deem essential to the finding of guilt. And as to the various elements of a military expedition to which I have referred, and the intention, if in any of them you think there is such reasonable question as to lead you to a reasonable and substantial doubt, it is your duty to give the defendants the benefit of that doubt. By that is not meant a mere possibility of a different opinion; nor the mere shadow of a doubt. It is to be a doubt based upon a reasonable consideration of all the circumstances, a reasonable and sensible view of the whole situation.

Another point that I should mention in connection with the testimony of Del Villar, and which I have been asked to charge is, that upon his own testimony, if there was a military expedition, he stands in the situation of an accomplice, testifying for the State; and that his evidence given in that character is to be looked upon with suspicion. It may all be true, but you criticise it. You apply tests freely. If you find it corroborated by circumstances which seem to make it probable, you accept it as probably true. In matters where it would seem improbable, if you do not find it corroborated, you should not act upon that alone. The tes-

timony of accomplices, being viewed with suspicion, ought to find some corroboration. The Government does not intend to rely, and does not ask a jury to convict defendants upon the mere testimony of accomplices. It is for you to say to what extent you find Del Villar's testimony corroborated; and if you do find it corroborated, then in this case, as in all others, the testimony of an accomplice may be extremely valuable, because it may explain naturally and easily the other evidence so as to enable you to reach an undoubted and rational conclusion. It is for you to say whether Del Villar's testimony is thus corroborated in its essential particulars; and to what extent his own testimony supports the contention that a military expedition was designed on the part of the men who embarked.

I am also requested to charge you, as I do, that the failure of the defendants to testify in this case is in no degree to be imputed against them. They may rely entirely on the ability of the Government to make out a case against them; and when they or their counsel consider that no case is made, and they do not go on the stand as witnesses, that circumstance is to be wholly disregarded, and is in no way to be taken to their prejudice. You judge by the testimony given whether the accusation is made out or not. The burden of proof from the beginning is upon the Government, to establish before you the fact of guilt by credible testimony, and beyond reasonable doubt.

Mr. Ivins: I have nothing to request. There are one or two parts of your Honor's charge to which we would like to except at the proper time.

The Court: Tell me now what the exception is. I may have spoken unguardedly.

Mr. RUBENS: That part where your Honor says that it will be sufficient if there is a partial execution of intention, and also where you say in your charge that if the design be present of a military expedition partly executed, that then they would be within the statute.

The COURT: Partly executed here. I think that is my charge—that stamps the expedition as of a military character.

Mr. RUBENS: I think there is a slight inaccuracy which your Honor would like to correct in your charge, where you say that Brabazon and Bueno said there was to be a transportation to Cuba.

The COURT: Didn't they say they were to go to Cuba?

Mr. IVINS: The witness states that they stated.

The COURT: Yes; that is the testimony of Mr. Bagg.

Mr. RUBENS: I have only one request to make, and that is that your Honor should instruct the jury that the confessions of any of the defendants are binding only on themselves and not on the others.

The COURT: Yes; that is so in this case. I will state to you, gentlemen, that the confessions of Bueno and Brabazon are binding upon themselves only, but I do not remember really that these confessions amount to anything more than that the men were going to Cuba to enlist. Brabazon said they were going to Cuba. Isn't that so, Mr. Hinman? Do you claim anything more?

Mr. HINMAN: Yes; I claim considerably more, but I do not care to go into any discussion now.

Mr. OLCOTT: I think you inadvertently stated what the indictment charged in saying that the defendant "formed a part of, or begun, set on foot," &c. I do not so understand

it in reading it. The indictment does not read that they formed a part of.

The COURT: What is your exception?

Mr. OLCOTT: Your honor used these words, that the defendants "were charged with having formed a part, or begun, set on foot, or provided the means." The indictment does not charge them with having formed a part. The indictment charges them in the words of the statute absolutely, "unlawfully and wilfully beginning, setting on foot, providing the means for;" but it does not say they formed a part. My point is that the defendant Bueno, being a passenger, might be considered from that fact alone, *ipso facto*, as having formed a part, and I do not think your Honor desires to do him the injustice of saying other than what is found in the words of the statute. I maintain that there is a distinction and great differentiation to be made between the words "formed a part of" and "beginning, setting on foot," etc.

The COURT: I think the man who forms a part of an expedition is one of those who sets it on foot.

Mr. OLCOTT: Not necessarily. I except to that part of your Honor's charge.

Mr. HINMAN: I ask your Honor to instruct the jury that the evidence either of enrollment or organization need not necessarily be direct evidence, but may be inferred from the circumstances of the case.

The COURT: Undoubtedly. The question of organization and enrollment and agreement may be inferred from the circumstances if there are such as seem sufficient to the jury to warrant it.

Mr. KOHLER: And in line with that that there could be

an enrollment for an expedition alone as distinguished from an enrollment for the Cuban army; and because Del Villar may have said that he intended eventually to join the Cuban army he did not necessarily contradict his statement that he had enrolled himself.

The COURT: Certainly not. I have recognized that all through. There is one other point, Mr. Hinman, these things I omitted to mention. Do you wish me to charge these?

Mr. HINMAN: The first one is the only one I care about, and I do not care very much about that. I do not think it is worth your Honor's while.

The COURT: Very well. I will charge these if you wish.

Mr. HINMAN: The first is in reference to the testimony of the Baggs, and I do not care about that, that their testimony is not the testimony of detectives and the statutes so hold.

The COURT: I should say that there is nothing in the situation or employment or relation of the Messrs. Bagg to this case which casts upon them any discredit or any reason why you should not give their testimony the same credit that you give to any other witness. You judge it as you would the testimony of any other witness. There is nothing to their disparagement.

Mr. RUBENS: There is one other charge that I would request, that as to so much of the evidence as tends to prove guilt, it must be incompatible with innocence——

The COURT: Yes, that is one request I intended to charge but omitted; and to say that in the application of the doctrine that if there is a reasonable doubt the benefit of that doubt must be given to the prisoner. (If you find the circumstances relied on to show guilt are as compatible with

the theory of innocence or of an innocent undertaking as with the theory of a prohibited undertaking, it is your duty to find for the defendant. The very fact that the circumstances are compatible with an innocent undertaking make a situation of doubt and reasonable doubt, the benefit of which you give to the prisoner.)

The jury then retired, and subsequently rendered a verdict of not guilty as to the five defendants.

I hereby certify that the foregoing is a copy of the charge of Hon. Addison Brown, J., in the case of The United States *vs.* John D. Hart *et al.*

FRANK D. CURTIS,
Stenographer U. S. Circuit Court.

Attest:

[SEAL.] GEO. J. CHAMBERS.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

BRAWLEY, *J.*:

GENTLEMEN OF THE JURY:—This is an action brought by the United States against Samuel Hughes, and I am requested by the learned counsel for the defendant to give you certain instructions which are as follows:—

1. The jury are instructed that it is not a crime or offense against the United States, under the neutrality laws in this country, for individuals to leave this country with intent to enlist in foreign military service. And the jury are further instructed that it is not an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.

That is the law and I so instruct you.

2. The jury are further instructed that it is no offense against the laws of the United States to transport arms, ammunition and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, munitions of war, only runs the risk of the seizure of such arms and contraband of war by the foreign power against whom they are intended to be used, but this does not make it an offense against the laws of the United States, and for such cause the defendant cannot be held guilty.

I so instruct you.

3. The jury are further instructed that it is no offense against the laws of the United States to transport persons, intending to enlist in foreign armies, and arms and munitions of war on the same ship; that in such case the person transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause defendant cannot be found guilty.

I so instruct you.

4. The jury are further instructed that the laws of the United States and this section "do not prohibit transporting of arms or of military equipments to a foreign country, or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between different parties in the same country."

I so instruct you.

5. The jury are further instructed that before they can find the defendant guilty under this indictment they must first find that there was "a military expedition or enterprise against the territory of the King of Spain, and that a military expedition or enterprise does not exist unless there is a military organization of some kind."

I so instruct you; the remainder of the instruction asked for, the court declines to give, as the words would be calculated to mislead; the instruction is given with such modifications as may be given when I state the law in my charge.

6. The jury are further instructed that if they find that there were transported on board the Laurada arms and men, but the same were not "a military organization as infantry, cavalry or artillery and officered or in readiness to be officered and equipped," then the jury must find the defendant not guilty.

That instruction is given to you subject to such modifications as will hereafter appear when I come to charge you.

7. The jury are further instructed that it is not an offense against the United States for a shipper to ship arms to a foreign country or "for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country, in such cases shippers and volunteers would run the risk, the one of capture of his property, and the other of the capture of his person by the foreign power" but the master of the American ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the Government of the United States, and would not be liable under this indictment.

I so instruct you.

8. The jury are further instructed that if they find, from the evidence in this case, that the master of the S. S. Laurada took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens without arms and equipments on their persons, and at the same time took on board certain boxes of ammunition and munitions of war, but that the said men were not organized as infantry, cav-

alry or artillery, or ready for such organization, the jury are instructed that they must find the defendant not guilty even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

I so instruct you subject to such modifications as may be given later.

The jury are further instructed that if they find, from the evidence that the defendant, as charged in the indictment, took on board, off the New Jersey coast, a number of men, unarmed, and not organized, either as infantry, cavalry or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendant not guilty, even if the jury should believe that the men intended, upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.

I give you that instruction to be taken as will be explained hereafter.

9. The jury are instructed that even if they find that the men taken on board were an organized military force with officers, as infantry, cavalry or artillery, the jury cannot find the defendant guilty unless they find also that the defendant, Captain Hughes, knew that they were such military organization, as infantry, cavalry or artillery; constituting a military expedition or enterprise against the Kingdom of Spain.

That is to be taken with such explanations as may be hereafter given.

10. The jury are instructed that if they find, from the evidence, that the passengers and boxes of arms did not

constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army, and the said arms and ammunition were being conveyed to Cuba to be used by either army, then the jury are instructed that the defendant, Captain Hughes, in transporting them in the due course of his business has committed no offense against the United States; and the jury are further instructed that all evidence of secrecy, such as taking on passengers and boxes of arms on the high seas, and putting out the lights on the coast of Cuba, were acts which the defendant might lawfully do to avoid the capture of the passengers and the capture of the property from off his ship by Spanish men-of-war; but under such circumstances, if the jury find there was no military expedition or enterprise, such act would not of itself be evidence of any intent to violate the statutes of the United States under which the prisoner is indicted.

I give you that instruction.

11. The jury are further instructed that the Government must satisfy the jury beyond a reasonable doubt of the guilt of the defendant as to the fact that this was "a military expedition or enterprise" and also as to the fact that the defendant knew or had reasonable opportunity to know and wilfully shut his eyes to the fact that it was a military expedition or enterprise against the Kingdom of Spain; and if the jury have from the testimony any reasonable doubt upon either of these questions, the jury will find the defendant not guilty. And the jury are further instructed that there is no presumption against the defendant by reason of his not testifying in this case, and that the Government still

has the burden of proof, and must satisfy the jury of the guilt of the defendant beyond a reasonable doubt in all material allegations of the indictment.

I give you that instruction.

Now, gentlemen, the defendant is indicted under section 5286 of the General Statutes which is in these words:—

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

That section makes it a misdemeanor to begin or set on foot or provide or prepare the means for any military expedition or enterprise. There is no inhibition under this statute against the shipment of arms or other munitions of war, nor are individuals forbidden to leave this country in unarmed associations for the purpose of joining in any military operations in a foreign country; persons who go upon such expeditions incur the risk of capture when they come within the jurisdiction of such foreign power, and arms and munitions so shipped may likewise be seized.

Whether our statutes on this subject provide with sufficient efficacy for the prevention of any acts which might tend to the violation of the obligation of neutrality is not a question for your consideration or my opinion. Under this indictment your duties are limited to the determination of the single question as to whether the defendant has violated the section as charged. As there is no evidence

tending to show that the defendant began or set on foot or was the leader of any expedition or enterprise, your inquiry is confined to a consideration of the other offense denounced and described in this section, to wit, the preparing or providing the means for any military expedition or enterprise.

Now, as it has been conclusively proved and is not denied that a number of men were carried by the defendant on board of his ship, that the means for the transportation of the same were prepared and provided by him, your inquiry is still further narrowed, and the simple question left for your determination is whether this was a military expedition or enterprise.

There is no precise definition given by any recognized authority of what constitutes a military expedition or enterprise. There would be no question that a military company organized, as infantry, artillery or cavalry, with officers, arms and equipments, would constitute such a military force that the transportation of it from within our territory or jurisdiction would come within the prohibition of this statute—the uncombined elements of such a force—that is to say, individuals not drilled or organized or capable of being put into a state of efficiency for warlike operations—would not constitute a military expedition within the meaning of this statute, and the transportation of such individuals as passengers would be legitimate commerce, such as our laws permit.

It is for you to decide whether this body of men fall within the first or second class. If the lines which distinguish between the two were clearly marked there would be no difficulty and nothing to submit to you—the court would instruct

you. It is because there is a wide borderland between the two not precisely delimited that a question arises for your solution, and to solve it rightly you must consider carefully all the testimony that you have heard, and I will now state to you so much of the evidence as may help you to a right conclusion. It is for you to determine the credibility of the witnesses—the duty of the court is to determine, and it has determined their competency. You can believe all or a part or none of these witnesses.

Now, proof has been offered to show that on the morning of the 21st of October just off the Jersey coast, the steamship Laurada took aboard certain men, thirty or thirty-five men, from a tug which met her at that point, that she also took aboard at the same time certain boxes and arms and ammunition. Whether those men were armed when they came aboard is a question for your determination. Some of the witnesses say they were, and some say they were not, some say that some were armed and others not, some of them say all the men had machetes which are described as long knives, some of the witnesses have called them swords. That after taking aboard these men the steamship set sail for the coast of Cuba, the route by which the Laurada would go in making her voyage to Jamaica would naturally and necessarily carry her by the coast of Cuba. What those men did aboard the ship after they got aboard is a question which you have to decide. If they came aboard and were received as ordinary passengers in unarmed association, and were carried simply as passengers and neither before they came aboard or after they came aboard were they organized as a military company, then under the law as given to you the transportation of those men would not be an offense under

this statute. But if after they got aboard they took the arms from the boxes and organized into a company or organization, if they were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together and of such drill or instruction, then from that time forth, they would be a military organization or enterprise within the meaning of this statute. It is for you to say whether they did go through that process of organization. There is no proof that before they came aboard they had been so organized, and in the absence of that proof you would not be warranted in assuming that they came aboard as a military organization, or that they were received as such. But, if after they came aboard, within the knowledge of the captain, who was master of the ship, and could control everything that went on aboard the ship, they were organized and drilled, if they took the arms from the boxes for the purpose of such organization and drill and were themselves put into a state of efficiency for warlike operation, then the enterprise would take on the nature of a military expedition within the meaning of this statute, and it is for you to determine from the testimony in the case whether that is so or not.

Some of the witnesses testified to the constant drilling, some of them testified to occasional drilling, some of them testified to their seeing no drilling at all, some of them say this drilling, or exercise of the manual of arms took place at such a point on the ship that any one passing that way, by the hatch, could see them. Other witnesses testified they passed by the hatch frequently and saw nothing of that kind going on. On that point the court cannot help you

to a conclusion, it is entirely for you to say whether or not that thing went on.

If you believe from all the circumstances attendant upon the embarkation of these men that they had before that time been organized into a military force or if you believe that without any previous organization or drilling they came aboard in a body for the purpose of forming while aboard the ship a military organization and that they brought with them such arms and munitions of war as would enable them to organize themselves and to create on board of that ship, and, therefore, within the jurisdiction of the United States, a military expedition or enterprise, and if you believe that while aboard the ship they became organized and were drilled or instructed in the manual of arms and were thus made capable of efficient proximate combination into a force prepared for immediate military operations, and if you believe that such a preparation for a military expedition was within the knowledge of the defendant, and that being the master of the ship, he permitted it to be used for such purpose, and that thereafter he transported such a body, providing for the maintenance and comfort of the organization thus formed, and aided in the landing of it near the scene where military operations were to be carried on, then he must be considered as guilty of violating the law under which he is indicted. If however you believe that the defendant, as master of a merchant ship, engaged in legitimate commerce, carried passengers to the Island of Cuba, simply as ordinary passengers, and that boxes of arms and ammunition were carried simply as merchandise, then he would be within his right, for under our laws it is not forbidden to transport either men or munitions of war.

And inasmuch as the Government had the right to seize such men and munitions upon their coming within its jurisdiction, which covers the waters within three miles of the coast of Cuba, the secrecy attending the landing would not of itself constitute an offence.

I must remind you, gentlemen, that you are trying this defendant for violating the laws of the United States, that this prosecution is not in the interests of Spain or instituted in furtherance of her plans for the repression of insurrection against her Government. The prosecution is conducted by the officers of your Government and in vindication of your laws, and you are bound by the regard which you have for your country and the reverence you have for its laws to consider the case divested of any feeling or prejudice or sympathy.

If the Government of the United States and our people desire to aid in the political regeneration of oppressed nations there are methods by which that end can be accomplished, but all those considerations lie outside the domain which circumscribes our duties here today.

In so far as the Government of Spain has brought to the attention of our Government this alleged violation of our laws and has offered witnesses to prove the same and has provided for the maintenance of the witnesses, pending the time when this testimony could be properly presented, she has been entirely within her right and the conduct of her officials in that regard is not a subject of just animadversion. When you come to the consideration of the testimony of such witnesses you will naturally and properly consider the fact, which is not denied, that the witnesses have been receiving pay from the Spanish Government, as affecting their

credibility, just as it is in all cases the duty of the jury to consider everything in the way of motive, interest, or inducement which tends to throw light upon such testimony, as to whether they are probably telling the truth or otherwise.

You will give the defendant the benefit of any reasonable doubt; that doubt must not arise from desire, but must grow out of the testimony; it must not rest upon the sympathy or wish to relieve him from the consequences of his act if you believe him to be really guilty.

Your verdict may be either not guilty or guilty, or guilty, with a recommendation to mercy.

UNITED STATES OF AMERICA, }
Eastern District of South Carolina. }

District Court.

UNITED STATES }
vs. } Indictment 5286, Rev. Stat. U. S.
SAMUEL HUGHES. }

Personally appeared Julia C. Courtney and makes oath that she is the official stenographer of the district court of the United States, for the eastern district of South Carolina, and that the foregoing nine pages of typewritten matter contain a true and correct copy of the charge to the jury of the Hon. William H. Brawley, United States district judge, presiding, on the 23d day of January, 1896, in the above-entitled cause, as the same was taken by me stenographically at the time, and transcribed from my stenographic notes, by me. JULIA C. COURTNEY.

Sworn to before me this 26th day of February, 1896.

[SEAL.] ARTHUR BRYAN,
Notary Public for South Carolina.

STATE OF SOUTH CAROLINA, }
County of Charleston, } ss:

I, Robert Graham, clerk of the court of common pleas and general sessions, in and for said county, (said court being a court of record,) do hereby certify that Arthur Bryan, whose name is subscribed to the certificate of proof, or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public, of the State of South Carolina, in and for the said county of Charleston, dwelling in said county, commissioned and sworn, and duly authorized to take the same. And, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate is genuine, and that said instrument is executed and acknowledged according to the laws of the State of South Carolina.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 26th day of February, 1896.

[SEAL.] ROBERT GRAHAM,
Clerk C. P. & G. S.

Endorsed: United States of America, eastern district of South Carolina. District court. United States *vs.* Samuel Hughes. Rev. Stat., 5286. Charge of court to jury, 23d January, 1896.

FILED
MAY 4 18
JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

J. H. S. WIBORG ET AL.
vs.
THE UNITED STATES. } No. 986.

Motion of the United States to Advance for Hearing at this Term.

HOLMES CONRAD,
Solicitor General.

Pearson Printing Office, 9th and D sts.

STATE OF SOUTH CAROLINA, }
County of Charleston. } ss:

I, Robert Graham, clerk of the court of common pleas and general sessions, in and for said county, (said court being a court of record,) do hereby certify that Arthur Bryan, whose name is subscribed to the certificate of proof, or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public, of the State of South Carolina, in and for the said county of Charleston, dwelling in said county, commissioned and sworn, and duly authorized to take the same. And, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate is genuine, and that said instrument is executed and acknowledged according to the laws of the State of South Carolina.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 26th day of February, 1896.

[SEAL.]

ROBERT GRAHAM,
Clerk C. P. & G. S.

Endorsed: United States of America, eastern district of South Carolina. District court. United States *vs.* Samuel Hughes. Rev. Stat., 5286. Charge of court to jury, 23d January, 1896.

Office Supreme Court U. S.
FILED
MAY 4 19
JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

J. H. S. WIBORG ET AL.
vs.
THE UNITED STATES.
No. 986.

Motion of the United States to Advance for Hearing at this Term.

HOLMES CONRAD,
Solicitor General.

Pearson Printing Office, 9th and D sts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

J. H. S. WIBORG ET AL.
vs.
THE UNITED STATES. } No. 986.

Motion of the United States to Advance for Hearing at this Term.

This cause comes here by writ of error to the District Court of the United States for the Eastern District of Pennsylvania.

The plaintiffs in error were convicted below of violating section 5286 of the Revised Statutes of the United States, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not more than three years."

The writ of error in this cause was allowed by Mr. Justice Shiras, and originally returnable on April 18, 1896, but on application of the plaintiffs in error the time was enlarged to and including May 1, 1896, on which day the transcript, appearing to be certified on the tenth day of April, 1896, was filed in the clerk's office and the cause duly docketed.

In view of the approaching adjournment of the court for the term and its announcements already made in regard to the hearing of causes, the law officers of the Government would not, under any ordinary circumstances, make application for the advancement and hearing of a cause at this term; but it is confidently submitted that the circumstances and considerations which induce this motion will certainly commend themselves to the court, and remove all question as to the propriety of the application, whatever disposition may be made of it.

The court will take judicial notice of the President's proclamation of June 12, 1895, but it may be convenient to here recite the portions of it bearing upon the matter involved in this cause:

"Whereas the Island of Cuba is now the seat of serious civil disturbances accompanied by armed resistance to the authority of the established Government of Spain, a power with which the United States are and desire to remain on terms of peace and amity; and

"Whereas the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established Government * * * by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such Government:

"Now, therefore, in recognition of the laws aforesaid, and in discharge of the obligations of the United States towards a friendly power, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties,

"I, Grover Cleveland, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with the execution of said laws the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same."

During the past summer the Government has had brought to its attention, by proper sworn complaints, many alleged violations of section 5286 of the Revised Statutes, and has instituted various prosecutions, but in no instance, except in the present case, has a conviction resulted, and the constructions of the law announced by the various judges of the United States District Courts have been, since the beginning of the present insurrection in Cuba, as they were before, not in harmony. During the coming recess of this court the Government has every reason to believe that it will be called upon to institute further prosecutions involving the very questions involved in this present cause, and it is of the highest importance to the performance of their duty that the law officers of the Government, and the District Courts of the United States should be advised by the authoritative decision of this court as to what *is* the law, to the end that, on the one hand there should be no undue interference with the lawful acts of citizens and inhabitants of the United States, and, on the other, that all officers of the United States charged with the execution of the laws may, as enjoined by the President's proclamation, use the utmost diligence in preventing the violations thereof, and in bringing to trial and punishment any offenders against the same.

The Government has undoubtedly the duty of supporting the conviction below in this cause by all proper arguments; but, quite apart from what conclusion this court may reach as to the proper construction of section 5286, or as to any other question properly involved in this cause, the law officers of the Government feel bound to earnestly press this motion upon the favorable consideration of the court, and with great deference submit that the presence of this cause in this court, now brought to the attention of the court by this motion, presents even at this late day of the term alike the opportunity and duty of considering and deciding the important matter

involved to the end that the law may be made certain as well for the protection of the citizens and inhabitants as for the guidance of the officers of the United States charged with the execution of the law.

The plaintiffs in error are at large on bail, pending the decision of this court. Notice of this motion has been given to counsel for plaintiffs in error. It is respectfully submitted that the facts and circumstances above stated fully warrant the undersigned in asking the court to set the case down for hearing at this term.

HOLMES CONRAD,
Solicitor General.

FILED
MAY 5 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 986.

J. H. S. WIBORG ET AL.

vs.

THE UNITED STATES.

Brief in Opposition to Motion of the United States to Advance for Hearing at this Term.

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

involved to the end that the law may be made certain as well for the protection of the citizens and inhabitants as for the guidance of the officers of the United States charged with the execution of the law.

The plaintiffs in error are at large on bail, pending the decision of this court. Notice of this motion has been given to counsel for plaintiffs in error. It is respectfully submitted that the facts and circumstances above stated fully warrant the undersigned in asking the court to set the case down for hearing at this term.

HOLMES CONRAD,
Solicitor General.

Office Supreme Court U. S.
FILED
MAY 5 1896
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 986.

J. H. S. WIBORG ET AL.

vs.

THE UNITED STATES.

Brief in Opposition to Motion of the United States to Advance for Hearing at this Term.

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 986.

J. H. S. WIBORG ET AL.

vs.

THE UNITED STATES.

Brief in Opposition to Motion of the United States to Advance for Hearing at this Term.

This cause comes here by writ of error to the district court of the United States for the eastern district of Pennsylvania.

The plaintiffs in error were convicted below of violating section 5286 of the Revised Statutes of the United States, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not more than three years."

This legislation embodies a portion of our neutrality acts and is substantially the same as when first enacted in 1794.

The Court is called upon for the first time in its history to construe it.

The case, in view of the present war in Cuba, is one of the gravest consequence, calling for the most careful preparation and the utmost deliberation.

I respectfully submit that in the few remaining weeks of the present term it is impossible either to present this case or consider it with the attention its gravity demands.

Further, that the Government fails to show sufficient reason why the case should be so speedily heard that the Court should forego its ordinary precautions in cases of importance to insure correctness of conclusion.

It is true that during the war which has been raging in Cuba for over a year there have been many prosecutions under the neutrality laws in the Federal courts; but in all those cases, as stated by the Solicitor General, there has been but one conviction, now under review, and there has not been and cannot be shown any diversity of ruling by the Federal courts except that created by the ruling of the district judge under review. With this single exception the instructions of the various judges have been in favor of the defendants. Surely from such a consensus of opinion the Government can experience no difficulty in guiding their action until the reassembling of the Court.

While, of course, the desires of the Government regarding the advancement of a case should ordinarily have great weight, yet the Court should not depart from its orders and force a hasty hearing on the other side unless great public exigencies justify such a course.

The Government has experienced no difficulty in properly performing its international obligations under the neutrality laws for the hundred years of their existence without any declaration by this Court on the subject now presented.

During that time there has seldom been a period without a war, in many of which our citizens have been involved commercially or otherwise. A number of these conflicts had their theater on our own continent and demanded the constant application of our neutrality laws.

The wars of independence in South America, in Mexico, in Texas, engaged the sympathies of our citizens and affected their interests, furnishing a vast amount of authority as to the construction of those laws and the action of our Government thereunder.

Coming down to more recent history, the Cuban war against Spain, which lasted from 1868 to 1878, was the cause of a most rigid enforcement of the neutrality laws by our Government, and a great number of precedents contained in our archives evidence the facility with which the neutrality laws were carried out. These fill many volumes. During this protracted war there was never supposed to be any difficulty in the way of the Government's proper performance of its international obligations.

The Government can hardly plead that they have not sufficient light to guide them, or that any special exigency at this period of our history exists why this Court should now in haste determine what course the Government should pursue.

In the absence of any overruling public necessity, the Court will not fail to give heed to suggestions made in good faith in favor of ample time for preparation and consideration of an important case.

It would be folly to pretend that before the Court adjourns during this month there is such sufficient time, unless, indeed, the case is of the character that it is more important it should be decided than how it should be decided.

The record has only been filed three days ago, and there has been no undue delay in having it returned to this Court.

The decision of this Court will be of the most far-reaching consequence.

For the first time it will declare for all time the signification of the most important clauses of our neutrality acts—as to what constitutes a military expedition.

The Court will not fail to perceive, from its familiarity with our international relations, that there is a vast fund of material in the manuscript archives of our Government which shows the construction given to the act by the various distinguished statesmen charged with our foreign intercourse. No conclusion can be safely reached which overlooks this source of information.

The character of the legislation in question, as traced in historical writings, and its legislative development are matters of the greatest importance.

Many of the older authorities are only to be found in books of trials not easy to obtain, while the recent precedents are contained in instructions of the court to the jury in different sections of the country as yet unreported and not in possession of counsel.

I mention these circumstances to your honors in order that the Court may see that if the case should be ordered to be argued at the present term that argument would necessarily be incomplete and an unsatisfactory basis for a decision by this Court.

The defendants do not wish to delay a hearing except for the purpose of securing a proper hearing. They are willing the cause should be advanced and set down for hearing the first day of next term. They submit that they are entitled to the full benefit of their writ of error, which implies ample time and opportunity by the employment to obtain a correction of errors by the appellate court.

Respectfully submitted.

W. Hallett Phillips,
For Plaintiffs in Error.

Office Supreme Court, U. S.
MAY 15 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 986. Advanced.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

CONSTRUCTION OF SECTION 5286 OF THE U. S. REVISED STATUTES.

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

BRIEF OF W. HALLETT PHILLIPS FOR PLAINTIFFS IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

The decision of this Court will be of the most far-reaching consequence.

For the first time it will declare for all time the signification of the most important clauses of our neutrality acts—as to what constitutes a military expedition.

The Court will not fail to perceive, from its familiarity with our international relations, that there is a vast fund of material in the manuscript archives of our Government which shows the construction given to the act by the various distinguished statesmen charged with our foreign intercourse. No conclusion can be safely reached which overlooks this source of information.

The character of the legislation in question, as traced in historical writings, and its legislative development are matters of the greatest importance.

Many of the older authorities are only to be found in books of trials not easy to obtain, while the recent precedents are contained in instructions of the court to the jury in different sections of the country as yet unreported and not in possession of counsel.

I mention these circumstances to your honors in order that the Court may see that if the case should be ordered to be argued at the present term that argument would necessarily be incomplete and an unsatisfactory basis for a decision by this Court.

The defendants do not wish to delay a hearing except for the purpose of securing a proper hearing. They are willing the cause should be advanced and set down for hearing the first day of next term. They submit that they are entitled to the full benefit of their writ of error, which implies ample time and opportunity by the employment to obtain a correction of errors by the appellate court.

Respectfully submitted.

W. Hallett Phillips,
For Plaintiffs in Error.

Office Supreme Court, U. S.
MAY 15 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 986. Advanced.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

CONSTRUCTION OF SECTION 5286 OF THE U. S. REVISED STATUTES.

Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

BRIEF OF W. HALLETT PHILLIPS FOR PLAINTIFFS IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 986. Advanced.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

BRIEF OF W. HALLETT PHILLIPS FOR PLAINTIFFS IN ERROR.

The defendants below, citizens of Denmark, were indicted in the district court of the United States, for the eastern district of Pennsylvania, under section 5286, of the Revised Statutes, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

The indictment charges that the defendants,—

"mariners, at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America." (R., p. 1.)

The trial was presided over by Judge Butler.

The defendants pleaded not guilty. (R., p. 2.)

There was a conviction by the jury. (R., p. 3.)

A motion in arrest of judgment was filed on the ground that the court was without jurisdiction to pass sentence. This was overruled, as was also a motion for a new trial (R., pp. 3, 4), and the men were sentenced to pay fines and to serve terms in the State penitentiary. (R., p. 7.)

A writ of error was sued out and the defendants admitted to bail. (R., pp. 50–56.)

A bill of exceptions (R., p. 8) brings up for review the errors assigned (R., p. 42) in overruling motion in arrest of judgment, in entering judgment, in refusing instructions requested by the defendants (R., p. 34), in the charge delivered by the court (R., pp. 34–41), and in the admission of certain testimony. (R., pp. 10, 11.)

The material facts of the case are found within a small compass.

The defendant Wiborg, a Danish subject, was the master of the Horsa, a Danish vessel, of which the other defendants, Petersen and Johansen, also Danes, were mates.

On November 9, 1895, the Horsa, under charter to a Philadelphia firm, departed from that port for Port Antonio, Jamaica, the master under orders from her charterers to proceed north, near Barnegat, and await further directions.

This he proceeded to do, and the ship stopped off Barnegat light at a point some distance outside of the three-mile limit and beyond the territorial jurisdiction of the United States.

While there, a tug brought out to the vessel thirty-nine passengers and a quantity of cases of freight—some forty-three boxes. At the same time the master received orders from the charterers to take the passengers and freight on board, including two row-boats, and to let the men off together with the freight wherever he should be requested.

The men were at the time unarmed, without equipments or apparent organization, military or otherwise.

The vessel after taking the men and freight on board proceeded on her course to Port Antonio.

On her way down, some of the men opened a number of boxes, and produced from them rifles, other arms and ammunition, including a small field cannon.

When about six miles from the coast of Cuba, the passengers disembarked from the steamer, carrying with them in in row-boats the boxes which had been ladened on the ship, near Barnegat, together with such arms and ammunition as they had unpacked.

If we assume that the purpose of the men was to join the Cuban army in the war of liberty now being waged against Spain, and that the munitions were destined for the same cause, the question for determination is whether the offense stated in the indictment was established.

Did the defendants, *within the territory and jurisdiction of the United States*, begin, set on foot, *and* provide and prepare the *means for a military expedition* and enterprise to be carried on *from thence* against the dominions of a foreign prince?

The Court will perceive there is but a single offense set forth in the indictment in a single count; but section 5286 Revised Statutes provides that any one of the acts mentioned in the indictment should constitute a separate offense. It would seem that every element of the crime alleged should be proven in order to establish the guilt of the accused.

But the court in the beginning of the charge to the jury said:

"The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc." (R., p. 37.)

Treating the case as resting on that part of the charge which the court thought should be considered by the jury—providing and preparing means for a military expedition—two points arise:

First. In view of the facts of this case, what is a military expedition within the meaning of the statute?

Second. The meaning of the words "provide or prepare the means of any military expedition or enterprise to be carried on from thence," etc.

Before discussing the charge of the court, we must express our regret, that in a case of so much importance, the district judge who presided at the trial, should not have exhibited that impartiality so characteristic of the administration of justice in the Federal tribunals.

The address of the judge was an undisguised attempt, only too successful, to influence the jury to find the defendants guilty, by unwarranted intimations and by expressions unsupported by evidence.

It is conceded that expressions of a defendant may be admissible as part of the *res gestæ*, but the fact that the defendants did not give any proof, that they did express surprise, and that the absence of such proof is to be considered to their prejudice, is certainly not within this rule. That this statement of the judge tended to influence the minds of the jurors to the prejudice of the plaintiffs in error, seems beyond question.

He says:

"When the men came to the ship off of Barnegat, there is no evidence that the captain or any one of the defendants expressed or exhibited surprise." (R., p. 40.)

The judge concludes his address, by some general observations on the duty of a proper enforcement of law, closing with these words:

"We are suffering today as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trust, as the result of want of faithfulness in executing the law." (R., p. 41.)

To reinforce the suggestion that the jury should find the defendants guilty of a violation of law, the judge informed them—

"That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt." (R., p. 39.)

It is true he proceeded to add that the question was one for the jury. This was after he had in a previous portion of his charge stated:

"That the men were principally Cubans. They came on board the vessel in a body *and appeared to be acting in concert under an organization or understanding of some sort. They were armed* having rifles and cannon and were *provided with ammunition* and *other* supplies." (R., p. 39.)

After this decision on the most important controverted questions of facts in the case, we do not see that the jury had any function left except to register in the form of a verdict the opinion of the judge. Moreover the comments of the judge on the inferences to be drawn from the evidence, were all as to the probable guilt of the defendants.

Such a charge so contrary to the judicial function, so opposed to the relations which should exist between judge and jury, in itself affords sufficient reason why the judgment should be reversed. There was not a fair trial.

Starr *vs.* U. S., 153 U. S., 614.
Hickory *vs.* U. S., 160 U. S., 422; 105 U. S., 350.
Adams *vs.* Roberts, 2 How., 486.

Where a judge so expresses himself as to inferences of facts that the jury may understand him to be stating principles of law, there is sufficient ground for a new trial. (Wharton, Criminal Practice & Procedure, section 798.)

Notwithstanding the confident opinion of his Honor below, we submit that the record fails to establish a "military expedition" within the language of the statute.

To understand what that expression imports, we must examine the whole legislation, of which the section under consideration, forms a part.

We should then trace its history, in order to perceive, the objects, Congress had in view, when it was enacted.

We should consider the construction placed on the language by our courts, the action of our Government in the enforcement of the act, and the signification of the term in the view of writers of authority.

When the construction of the section is made clear, the further question will remain, whether there was any evidence properly submitted to the jury, of a military expedition, inhibited by the law.

The charge of the court, on the law, which was duly excepted to, and is now assigned for error, was as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not

"That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt." (R., p. 39.)

It is true he proceeded to add that the question was one for the jury. This was after he had in a previous portion of his charge stated:

"That the men were principally Cubans. They came on board the vessel in a body *and appeared to be acting in concert under an organization or understanding of some sort. They were armed* having rifles and cannon and were *provided with ammunition* and *other* supplies." (R., p. 39.)

After this decision on the most important controverted questions of facts in the case, we do not see that the jury had any function left except to register in the form of a verdict the opinion of the judge. Moreover the comments of the judge on the inferences to be drawn from the evidence, were all as to the probable guilt of the defendants.

Such a charge so contrary to the judicial function, so opposed to the relations which should exist between judge and jury, in itself affords sufficient reason why the judgment should be reversed. There was not a fair trial.

Starr *vs.* U. S., 153 U. S., 614.
Hickory *vs.* U. S., 160 U. S., 422; 105 U. S., 350.
Adams *vs.* Roberts, 2 How., 486.

Where a judge so expresses himself as to inferences of facts that the jury may understand him to be stating principles of law, there is sufficient ground for a new trial. (Wharton, Criminal Practice & Procedure, section 798.)

Notwithstanding the confident opinion of his Honor below, we submit that the record fails to establish a "military expedition" within the language of the statute.

To understand what that expression imports, we must examine the whole legislation, of which the section under consideration, forms a part.

We should then trace its history, in order to perceive, the objects, Congress had in view, when it was enacted.

We should consider the construction placed on the language by our courts, the action of our Government in the enforcement of the act, and the signification of the term in the view of writers of authority.

When the construction of the section is made clear, the further question will remain, whether there was any evidence properly submitted to the jury, of a military expedition, inhibited by the law.

The charge of the court, on the law, which was duly excepted to, and is now assigned for error, was as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not

necessary, nor is it important that they intended to make war as an independent body or in connection with others." (R., p. 37.)

We have already called attention to the fact, that the judge below further instructed the jury, that the men came on board the vessel in a body *and appeared to be acting in concert under an organization or understanding of some description*, and that they were armed. We pointed out, that this finding of fact, by the judge, was not only improper, as infringing on the prerogative of the jury, but that, in addition, there was no evidence to justify the statement except that the men came on board together. This in itself was no evidence of organization of a military expedition here.

The uncontradicted evidence was at the time of embarkation the men were unarmed.

Passing for the present, from a more particular examination of the charge, we direct the attention of the Court to the law on the subject.

With one or two exceptions, not pertinent to the present case, the provisions of the Revised Statutes on the subject are the same as those contained in the act of June 5, 1794 (1 Stat., 381).

Section 5281, Revised Statutes, prohibits the acceptance of commissions from a foreign power, by citizens of the United States, within our territory, to serve against any sovereign with whom we are at peace.

Section 5282, forbids our citizens from enlisting in foreign service, within the United States.

Section 5283, makes it a crime, to fit out or arm vessels in this country, against a sovereign at peace with the United States.

Section 5284, inhibits the fitting out or arming within the United States, of vessels to cruise against citizens of the United States.

Section 5285, prohibits within the United States, the augmenting of the force of a foreign vessel of war serving against a friendly sovereign.

Section 5286, prescribes penalties for beginning or setting on foot within the United States, or furnishing the means for a military expedition from hence against a friendly sovereign.

Sections 5287–5290, provide for the enforcement of the foregoing sections.

Section 5291, enacts that the provisions set forth shall not be construed to prevent the enlistment of certain foreign citizens in the United States.

The act of June 5, 1794, "An act in addition to an act to punish certain crimes against the United States" (1 Stat., 381), was passed for a term of two years, continued for a further similar term by act March 2, 1797 (1 Stat., 497), and made perpetual by act April 24, 1800 (2 Stat., 54). On March 3, 1817 (3 Stat., 370), the previous legislation was amended, by adding provision for precautionary bonds from owner of armed ship, and vesting power to detain the vessel. This act was, in the first instance, temporary, but all provisions on the subject, were incorporated in act of April 20, 1818 (3 Stat., 450), which consolidated the previous statutes.

This last act added a provision to cover cases arising out of the civil wars being waged between Spain and South American countries; it forbids fitting out of vessels to cruise in the service of any colony, district, or people.

This was intended to apply to unrecognized governments.

An inspection of the sections of the Revised Statutes, proves that the term "military expedition" in section 5286, is used in contradistinction to the *naval* expedition covered by the other sections; the one including operations on land, the other on the sea. The one expression is used in as large a sense as the other.

The English foreign enlistment act (33 and 34 Vict., c. 90, sec. 11), which is taken from our legislation but contains more stringent provisions, includes the words "military *or* naval expeditions." The clause is as follows:

"If any person within the limits of Her Majesty's dominions and without the license of Her Majesty, prepares or fits out any naval or military expedition against the dominions of any friendly State * * * every person engaged * * * or employed in any capacity in such expedition shall be guilty of an offense against this act."

The previous act is that of 1819. (59 Geo. III, c. 5.)

The evils sought to be remedied by the act of 1794, were those which arose out of the operations in this country of Genet, the Minister from France, in consequence of the European war of 1793.

Genet assumed in behalf of the French government to exercise in this country, the sovereign powers of giving commissions to privateers, of arming vessels of war, of commissioning officers, and levying men to make war from our territories on the enemies of France. (Wheat. Int. Law, sec. 14.)

He endeavored to enlist in this country, a large military force, with officers commissioned by him, in order to

attack Louisiana, then a Spanish possession, and to take New Orleans. Under date of July 5, 1793, Jefferson notes:

"Mr. Genet called on me and read to me very rapidly instructions he had prepared for Michaud, who is going to Kentucky; an address to the inhabitants of Louisiana and another to those of Canada. In these papers it appears that, besides encouraging those inhabitants to insurrection, he speaks of two generals in Kentucky who have proposed to him to go and take New Orleans, if he will furnish the expenses, about £3,000 sterling. He declines advancing it, but promises that sum ultimately for their expenses; proposes that officers shall be commissioned by himself in Kentucky and Louisiana; that they shall rendezvous out of the territories of the United States—suppose in Louisiana, and there making up a battalion to be called the ——— of inhabitants of Louisiana and Kentucky, and getting what Indians they could, to *undertake the expedition* against New Orleans, and then Louisiana to be established into an independent State, connected in commerce with France and the United States." (9 Jefferson's Works (ed. 1854), p. 150.)

Troops were raised and commissions were sent by Genet to General Clarke to name and commission other officers for a corps of soldiers. French agents were sent to Kentucky to assist. In answer to letter of Jefferson requesting Governor Shelby of Kentucky to prevent the carrying out of the expedition, the Governor answered expressing his doubt whether there existed any law to restrain or punish the alleged offense:

"If it is lawful for one citizen of this State to leave it, it is equally so for any number of them to do it. It is also lawful for them to carry with them any quantity of provisions, arms and ammunition with whatever intent."

The answer of Edmund Randolph, who had succeeded Jefferson as Secretary of State, was:

"They may, it is true, leave their country; they may take arms and provisions with them; but if these acts be

done not on the ground of mere personal liberty *but of being retained in a foreign service* for purposes of enmity against another people, satisfaction will be demanded and the State to which they belong cannot connive at their conduct without hazarding a rupture."

He spoke of the movement as an unlawful assembly of a military force. (Am. State Pap., 1 For. Rel., 457–'9.)

In the same year, Genet had granted military commissions to officers for the enlistment, training and conducting of a corps of troops to be enlisted and organized in South Carolina, for an expedition to conquer Florida from the Spaniards for France.

> Message of President Washington, January 15, 1793, Am. State Papers; 1 For. Rel., 309; 8 Life and Works of John Adams, 515.

Such were the military enterprises from this country, the suppression of which was one of the avowed objects of the act of 1794.

These movements were of such magnitude as to amount to invasions of foreign states; such as when—

> Young Octavius, and Mark Antony,
> Came down upon us with a mighty power
> Bending their expedition tow'rd Philippi.

The Court will contrast "the military expeditions" aimed at by the act, with the case now presented of the transportation of a few Cubans seeking to join their compatriots in arms in their native land, and the conveyance of a small quantity of arms and ammunitions.

The position assumed by our Government was that these acts of Genet were a palpable violation of the sovereign rights of the United States.

Jefferson in a letter to Genet, June 5, 1793 (1 Wait's St. Papers, p. 81), said:

"The granting of military commissions within the United States by any other authority than their own, is an infringement on their sovereignty."

Prosecutions were instituted of which the Henfield case was one of the first. The theory on which the Government proceeded was that these acts were common-law crimes. We know that this proposition was soon abandoned, and it thereupon became evident that a statute prohibiting these violations of American sovereignty would have to be passed.

The statute of 1794 framed by Hamilton (see Hamilton's works, vol. 5, p. 97) was then passed. It was adopted in Senate by casting vote of Vice-President John Adams. (Annals Cong., M'ch 12, 1794, p. 67.)

The framers of the act of 1794, were careful not to limit the activities of a commercial community like ours, nor deprive us of the benefits of our situation, as a neutral nation, at a time most of Europe was at war.

In 1793 Mr. Jefferson informed Mr. Hammond, the British Minister, that the purchase and exportation of arms in this country by a belligerent was lawful:

"Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their calling, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced by the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies." (3 Jefferson's Works (ed. 1854), p. 558.)

It is not surprising that our early policy and legislation, contained no inhibition against furnishing arms and other munitions of war to belligerents, or to rebels, who had not yet been accorded the dignity of belligerency. The framers of the act of 1794, had still fresh in their memory, the aid afforded us, through the supply of munitions of war obtained in France, during our Revolution, although at that time, France was neutral. (4 Canning's Speeches, p. 155.)

In the Franco-German war of 1870 not only were arms allowed to be freely sold and transported from hence to the belligerents but even our Government itself sold a large quantity of them to agents of the German government.

This action has been approved by the best opinion here and abroad and has been sustained by reports of committees of Congress. (Snow's Cases of International Law, 459.)

Our Government has always acted in accordance with these views. See Wharton International Law Digest, sec. 391; and our courts have frequently held that such traffic was perfectly legal.

The Itata, 49 F. R., 646; 56 F. R., 505.
U. S. *vs.* Trumbull, 48 F. R., 99.
The Florida, 4 Benedict, 452.
The Carandolet, 37 F. R., 799.

The rule is the same where the belligerency of the party for whose use the material is destined has not been recognized.

11 Opinions Att'y Gen., p. 452.
The Itata, *supra.*
The Florida, *supra.*
Hendricks *vs.* Gonzalez, 67 F. R., 351.

This rule is of course limited to the transportation of such arms as are not to be used to constitute the vessel itself a vessel of war.

City of Mexico, 28 F. R., 150.
Mary N. Hogan, 18 F. R., 529.
U. S. *vs.* 214 Boxes of Arms, 20 F. R., 50.

This Court has, however, decided that an armed vessel may be sold to a belligerent, provided the sale be a *bona fide* transaction and no more than the crew necessary to navigate the ship, be placed on board.

Santissima Trinidad, 7 Wheat., 340; see also
U. S. *vs.* Quincy, 6 Peters, 445.
The Meteor, Snow's Cases International Law, 418.

The statute does not provide for the seizure and forfeiture of the vessel or arms, even when they are the means provided for a military expedition. It was with this fact in view that Congress passed the special act of 1838 (5 Stat., 212), which was limited to contiguous countries, by which on probable cause only, such arms, etc., could be seized by the United States.

Nor was it proposed to restrict the personal liberty of individuals to embark their fortunes and risk their lives on the side of struggling nationalities.

We had just emerged ourselves from a war of independence.

We had not forgotten the services of lovers of liberty from other lands, who in time of our peril had tendered us their swords and espoused our cause.

Indeed this is a privilege, necessarily arising out of the

rights of our citizens to free locomotion and expatriation. This has been decided in the cases of the Santissima Trinidad, 7 Wheaton, 340, and U. S. *vs.* Kazinski, 2 Sprague, 7.

We find that on March 17, 1818, (Annals of Congress, 15th Cong., 1st sess., vol. II, p. 1404), in the course of the debate on this statute, Mr. Clay moved to strike out the words which made it penal for a person to "go beyond the limits or jurisdiction of the United States, with the intent to be enlisted or entered" in the service of any foreign prince or state. This motion was carried without count. For a person to engage or retain another to do this, however, is still a crime, as defined by that section.

If it is legal for individuals to leave this country for the purpose of enlisting in a foreign force, it cannot be illegal to transport them. If it is lawful to ship arms and lawful to ship these men, the mere fact that they go on the same steamer cannot bring them within the purview of the statute.

During the Franco-Prussian war two large ships, the Ville de Paris and the Lafayette, departed from New York conveying 1,200 Frenchmen together with an enormous amount of munitions of war, the avowed destination of men and arms being the French army, then seeking to repel the German invasion of France.

Secretary Fish refused to consider this as a transportation from hence of a military expedition, or as in any way opposed to our laws or our duties. He held that the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organized whole.

See statement of case in Hall's International Law, 609.

His opinion has met with the approval of the most generally accepted writers on international law. (Calvo, Le Droit Int., sec. 2325; Bluntschli, sec. 762.)

A report of this matter is to be found in English Accounts and Papers, State Papers, vol. 71 of 1871, Franco-Prussian war, p. 128, in connection with the "Lafayette."

"Sir E. Thornton to Earl Granville.

"WASHINGTON, *September* 26, 1870.

"MY LORD: With reference to my telegram of the 22d instant, in which I reported to your Lordship the shipment of arms and ammunition for France on board the French steamer 'Lafayette,' which left New York on the 20th instant, I have the honor to inform you that it has been generally said by the newspapers, and even Mr. Fish told me, that there were a much larger number of arms than I have mentioned in that telegram besides some cannon. From the source, however, whence I obtained the information, I am inclined to think that my report is correct (*i. e.*), 6,000 rifles, 3,000,000 cartridges.

"The Lafayette also took between 500 and 600 Frenchmen, who, it was generally supposed, were about to join the French army. But there seems to be no proof that they had been enlisted in the United States or that they were anything more than volunteers, who were going as passengers of their own free will, and without any engagement. It seems, however, that Mr. Roesing, the North German Consul General, made a representation to the authorities with a view to the Lafayette's being prevented from leaving the port, and although this step was unsuccessful, they were induced to go on board and select 86 Frenchmen from among the passengers and arrest them. These were not provided with tickets, but as nothing else could be proved against them, they were immediately discharged, though not in time to regain the steamer, which started with their luggage on board.

"The District Attorney had previously telegraphed to Mr. Fish for instructions and Mr. Roesing to my Prussian colleague, urging that orders should be sent for the detention of the Lafayette. Mr. Fish replied to the District Attorney,

that he was to be guided by the neutrality laws of the United States, and that with regard to the ship it could not be alleged that she was intended for hostile purposes against North Germany. As for the arms and ammunition, they were articles of a legitimate commerce, with which the United States would not interfere, although the vessel might run the risk of being detained by the cruisers of North Germany on her voyage to France. Baron Gerolt also called upon Mr. Fish and earnestly urged him to order the detention of the Lafayette, but I understand received a similar answer to that which had previously been given to the District Attorney. Mr. Roesing asserts that he will make it clear to the authorities that the men on board the Lafayette had actually been enlisted in New York, but he has not as yet been able to do so and he is threatened with an action for damages by the men who were detained.

"I have, &c.,

"(Signed) EDW'D THORNTON."

Lawrence Elements International Law (1895), pp. 507–'8, speaks as follows in connection with this case:

"A point in connection with expeditions was raised in 1870, when a large number of Frenchmen and Germans, resident in the United States, returned to their own country at the outbreak of the Franco-Prussian war, in order to fulfill their obligation of military service. As long as they traveled singly or in small groups as ordinary passengers, no international question could by any possibility arise. But in one case as many as twelve hundred French subjects embarked at New York in two French ships, which carried a cargo of rifles and ammunition. The attention of Mr. Fish, then Secretary of State in President Grant's Cabinet, was called to the matter. He decided that the vessels could not be looked upon as constituting a warlike expedition against Germany; and there can be little doubt that he was right. The Frenchmen were unarmed and unofficered. There was no attempt to submit them to military discipline, and though it was not denied that they would be enrolled in the fighting forces of their country as soon as they reached its soil, it was held that they did not leave New York in an organized condition. Their warlike uses were too remote for them to be considered as a portion of the

combatant forces of France in such a sense that American neutrality was violated by their departure, though they could have been made prisoners on the voyage by German cruisers."

Lawrence, Elements Int. Law (1895), pp. 507, 508.

The case of the Virginius is of great importance in this connection. It exhibits the enforcement of a similar rule by our Government under circumstances of the greatest gravity. The action of the Spanish authorities, in seizing this American vessel on the high seas in 1873, and putting to death fifty-six persons out of the 155 found aboard, many of whom were American citizens, almost precipitated this country into a war with Spain. The elaborate discussion which ensued between Mr. Fish and the Spanish government, displays his usual careful and conservative views.

The case is important as showing the opinion of our Government, as to what constituted a military expedition. After Spain had tendered satisfaction for the murder of our citizens by the Spanish authorities in Cuba, that government made reclamation against the United States, on the ground among others, that the Virginius carried from the United States, a military expedition.

The elaborate discussion which ensued between the two governments, and the notes by Secretary Fish sustaining the American claim of exemption, constitute an important portion of our diplomatic history.

The facts in short, as shown by Spain, were that the Virginius had been previously engaged in conveying men and munitions of war to aid the then Cuban revolution against Spain. That on the voyage during which she was captured, she took out munitions of war. That a much larger supply

of arms and men was placed on her by the assistance of a schooner which met her on the high seas. That when she left New York she had on board a number of Cubans, including some of the principal officers in the Cuban army. That her papers and crew list were false, her manifest did not state her cargo, and the voyage was undertaken under circumstances of the greatest suspicion and concealment. The vessel was said to have been bought by the enemies of Spain, and there was no question that the object of the Cubans on board was to reach Cuba and join the Cuban army.

In his answer to the Spanish claim, Mr. Fish calls the attention of the Spanish minister to a provision of the treaty between the United States and Spain of 1795 under which the right of our citizens to carry contraband of war to the enemies of Spain was recognized, subject to seizure in time of *recognized war*, on the high seas; but the right of seizure was limited to such articles of contraband only and was not to be extended to persons not in the civil, military, or naval service, of the enemies of Spain. He then calls attention to the order of the captain general of Cuba "to indiscriminately slaughter 'all persons captured in such vessels ("having on board men, arms, and munitions, that can in any manner promote the insurrection in this province"), without regard to their number,'" which he says "could not but shock the sensibilities of all humane persons." And that "he was constrained to object to the execution of the order against citizens of the United States."

He declared that he "was constrained by a due regard to universally recognized principles of international rights and duties to declare, that in the absence of a recognized state of

war, it was no offense in the sailing vessels and steamers of the United States to carry arms and munitions of war for whomsoever it might concern. If a state of war should exist, if Spain should be entitled to the rights of a belligerent, parties concerned in the shipment of arms and military supplies for her enemy would incur the risk of confiscation by her of their goods; but their act would involve no ground of reclamation against their government in behalf of Spain; and consequently no right to invoke the aid of that Government in preventing the perpetration of the act. Such it is believed is the established law of nations, and such the received rule even when the shipment of arms and munitions is made from the territory of the country whose citizens may be the parties engaged in the introduction of these supplies for the use of one of the belligerents."

In regard to the position of the Spanish Minister, that our duty towards Spain, required our Government to prevent the Virginius from leaving New York, in order to properly enforce our neutral obligations, and that she carried an unlawful expedition, Mr. Fisk called the attention of the Minister, to the principle, that the idea of *neutrality* was inseparable from the idea of a belligerency to which the neutral was not a party; that Spain had not been willing to concede that a state of war existed in Cuba, and therefore, the rights and duties of the United States towards Spain, were only to be measured by the rights and duties of one nation towards another, in case an insurrection exists, which does not rise to the dignity of recognized war.

That what our Government may not knowingly permit to be done is defined by our statutes; that the United States, had not left this class of acts to be judged by the common or international law, but had provided by *statute*, which of them should be regarded as criminal and punished accordingly.

"But a friendly government violates no duty of good neighborhood in allowing the free sale of arms and munitions of war to all persons, to insurgents as well as to the regularly constituted authorities; and such arms and munitions, by whichever party purchased, may be carried in its vessels on the high seas, without liability to question by any other party. In like manner its vessels may freely carry unarmed passengers, even though known to be insurgents, without thereby rendering the government which permits it liable to a charge of violating its international duties. *But if such passengers, on the contrary, should be armed and proceed to the scene of the insurrection as an organized body, which might be capable of levying war, they constitute a hostile expedition* which may not be knowingly permitted, without a violation of international obligation.

"During the late Franco-German war, each party was free to purchase arms and munitions of war in this country, and did so; and Frenchmen whose hearts were with their struggling countrymen at home, or Germans who wished to join the invading armies of Germany, were free to leave the shores of the United States for that purpose, so long as they left as private citizens, *unarmed, and without engagement made in this country to enter the service of a belligerent.* They did thus leave, in vessels of several different nationalities. Neither this Government nor any other neutral government which may have allowed its merchant marine to transport the arms and munitions of war or the passengers to Europe, was guilty of a violation of its duties as a neutral.

"Even recognized war, therefore, cannot oblige neutral nations to contract the right of their citizens to engage in such commerce, which is lawful in time of peace, or to abridge the liberties of persons enjoying the protection of their flag, to such a point as to render illegal either of these proceedings, although in time of actual war the transportation on the high seas of articles known as contraband of war is to be made subject to the right of capture. But in time of peace no vessel of war has the right to capture, or even to interfere with, molest, or detain upon the high seas a regularly documented vessel of another power."

"Of what military expedition," Secretary Fish subsequently remarks, "the Virginius was to form a part it is difficult to comprehend. The present most intelligent minister from Spain charges that she was to form part of some

military expedition, but he has not shown either her capacity or fitness to take part in a military expedition, or that there was at that time any military expedition fitting out, of which she was to form a part, or with which he in any way connects her."

Foreign Relations, 1874, pp. 1181, 1190, 1207, 1213, 1236.

See cases of the Perrit, p. 1196, and the Upton, p. 1204.

Under date of June 9, 1874, Mr. Fish, writing to Mr. Cushing, our minister to Spain, informed him that the President—

"Feels, that the maintenance of good relations with Spain depends upon her adherence to the statements and assurances hitherto given to this Government, respecting the abandonment of the objectionable decrees, and the disavowal and punishment of the assassins, who, under the guise of the form of trial, shocked the civilized world, by the executions in Santiago de Cuba."

Message of the President, Ex. Doc. H. R. 90, 44th Cong., 1st sess., pp. 45, 56–66.

The judicial precedents are in accordance with the political action of our Government. They declare that all the elements of a military expedition must be united in order to constitute the crime denounced by the statute.

Although until comparatively recently, there has been no attempt on the part of the courts to clearly define what constitutes a military expedition, we find a substantial agreement in the construction of this section.

The first case tried under the act of 1794, arose out of the prosecution of Smith and Ogden, in 1806. (Trial of Smith and Ogden.)

This famous prosecution throws little light upon the present controversy. Although there was an acquittal of

the defendants, there is no doubt but that a military expedition, in the full sense of the term as used in the statute, was fully established. The case derives its importance not so much from any points adjudicated, as from the political interest with which it was invested. It was sought by the opponents of Mr. Jefferson's administration, to implicate him in the Miranda Expedition, which, in 1806, departed from New York, after having been set on foot and provided with its means, by Ogden and Smith. It was under the command of General Miranda, who was known to aspire to be the Emancipator of South America. Ogden furnished the ship Leander for the purposes of the expedition in the city of New York, fitted out as a vessel of war. She was provided with a large armament consisting exclusive of her complement of 17 guns, of thirty cannon, and carried a large number of men, citizens of the United States who had been enlisted here by one of the defendants and who were enrolled in the service of Miranda. They were provided with uniforms and fully armed.

The indictment was separate against each defendant and each indictment was founded on separate counts. That against Smith alleged that he set on foot a military expedition in this country to be carried on against the dominions of Spain in South America. Another count alleged that the defendant was concerned in preparing the expedition by providing the means for carrying it on in this country. The means specified in the indictment were men and money. The allegations as to Ogden were contained also in separate counts. One alleged that he set on foot, in the city of New York a military expedition to be carried on from thence against the dominions

of the King of Spain; another stated that Ogden began in the place alleged, such an expedition; a further count stated that he prepared the means for such an expedition, to wit, one ship which is stated to have been armed here (Charge of Judge Talmadge, Trial of Smith and Ogden, p. 240). The judge charges that "from 180 to 200 men were here engaged in the enterprise; several of them immediately after took military title, and all were submitting to subordination and discipline."

The Leander encountered Spanish war vessels before she reached South America. An engagement ensued, the invaders were defeated, and the Leander gave up the expedition.

Here was a military expedition complete in all its parts. A regularly enlisted and organized body of soldiers armed and officered as a military force with a definite military object, and conveyed by a vessel armed for war, to its destination. The object of the expedition was to surprise Caracas and so effect the independence of what is now known as Venezuela.

President Jefferson and Madison, who was Secretary of State, vehemently denied any participation in this expedition, though they acknowledged they knew that Miranda expected to start a movement, in South America. Some years after the trial, Jefferson, writing to Foranda, the Spanish minister, in speaking of the trial of Smith and Ogden, declared he had no connivance in Miranda's expedition:

"We had no suspicion that he intended to engage men here, but merely to purchase military stores. Against this there was no law, nor consequently any authority for us to interpose obstacles." (5 Jefferson's Works, p. 474.)

In the case of Workman & Kerr (Wharton. Am. Criminal Law, § 2802, Trial of Workman & Kerr), the judge held that the means for a military expedition might be prepared by enlisting men or inducing others to enlist them.

Judge Judson (Wharton Am. Cr. Law, p. 1017) in U. S. *vs.* O'Sullivan, charged:

"Before the jury can convict on this indictment, it must be proved to their satisfaction, that the expedition or enterprise was in its character military, or in other words, it must have been shown by competent proof, that the design, the end, the aim and the purpose of the expedition or enterprise, was some military service, some attack or invasion of another people or country, or State or colony, as a military force. The engagement of men to invade or attack any other people or country by force or strong hand; the designation of officers, the classification and division of the men into regiments, squadrons, battalions or companies; the division of the men into infantry, cavalry, artillery or riflemen; the purchase of vessels or steamboats, military stores, such as powder and ball, for an expedition, give character to the expedition itself, provided there is sufficient proof to satisfy the jury that they are to be used."

Judge Betts, in his opinion in the same case, says in speaking of what constitutes a military expedition, it is important to ascertain "whether men have been secured or employed to carry it." And further on he calls attention to the fact that it is obvious that men will not be openly enlisted or officers commissioned.

In *Ex parte* Needham, 1 Peters C. C., 487, foreigners were enlisted or otherwise engaged and came here with military equipments under command of Needham, who, with the title of colonel, exercised authority over and ordered them to appear at a certain place of rendezvous, where they were drilled and exercised.

In the Lumsden case, 1 Bond, 5, Judge Leavitt says:

"Probably a previously concerted movement or arrangement would be sufficient to constitute such a *beginning*. And if this was followed up by the designation of a plan for an enlistment or enrollment, it would bring the parties implicated within the section referred to."

In U. S. *vs.* Ybanez, 53 Fed. Rep., 537, the court repeats the language of Judge Judson in the O'Sullivan case.

Judge Wales in U. S. *vs.* Pena, 69 F. R., 983, says:

"A military expedition or enterprise means a military organization designated as infantry, cavalry or artillery, officered and equipped, or in readiness to be officered and equipped for active hostile operations."

The case of The U. S. *vs.* Rand, 17 Fed. Rep., 142, which was decided by the same judge who presided in the case now before the court, will of course be relied on by the Government. But in that case the men were put in uniform, drilled and prepared for active service, and they actually did attack and capture the town of Mirogoane. It was an organized military force, in every sense of the word.

The late adjudications made since the outbreak of the present conflict in Cuba, involving the enforcement of section 5286, are found in the instructions of the judges to the juries and in preliminary examination.

The most important are—

U. S. *vs.* Pena, 69 Fed. Rep., 983.

(Preliminary hearing)—

U. S. *vs.* Hughes, 70 Fed. Rep., 972.

U. S. *vs.* Hughes (not yet reported).

U. S. *vs.* Hart (not yet reported).

Judge Brawley, in the Hughes case, follows the decisions of the Pena case and of Secretary Fish, while Judge Brown gives a very learned and exhaustive definition of what constitutes a military expedition. The charges of Judges Brawley and Brown being not yet reported we have had printed for the use of the court.

Foreign authorities are in harmony with American precedents.

One of the most frequently cited is the Saldanha incident. Four vessels carrying Portuguese troops, officers and men, to the number of 652 under the command of General Saldanha who had been the Portuguese constitutional minister of war in 1827, departed from England, in order to effect a revolution in Portugal. The English government sent a naval force to intercept the landing of the expedition on Portuguese territory, and effected their object by force exercised near a Portuguese harbor. This action excited the party spirit of the day, and was condemned because England, it was claimed, did not have authority to pursue the expedition after it had evaded her territorial jurisdiction.

3 Phillimore Int. Law, III, 291.

Walker, after discussing the American precedents of the French troops and arms transported from this country, to which we have referred, and after observing that our Government acted on that occasion with propriety, since it was universally acknowledged that no military expedition was shown, adds:

"On the other hand, the elements of an expedition may be recognized in a seemingly less dangerous proceeding. The British ministers, for example, however open to criticism may have been their method of action were well ad-

vised when, in 1827, they conceived it to be their duty to prevent the landing in Terceira of Count Saldanha and his followers although the members of the party left England entirely unarmed."

This author asks:

"What, however, is a hostile expedition? Such an expedition in general consists of an armed and organized body about to depart the soil in pursuance of a present design to carry on hostilities in the immediate future against a particular government. But the absence of a single feature may change the character of the entire proceeding."

Int. Law, 457.

Calvo, one of the most accurate of modern writers on international law, defines a military expedition as being an armed enterprise against a country:

"Entreprise á main armeé contre un pays: l'expedition d'Egypte, l'expedition de Zerces."

Dict. de Droit Int. verbo, Expedition militaire.

Lawrence in his Elements of International Law, 507–'8, says:

"What constitutes a warlike expedition?

"It must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory; nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offense against the sovereignty of the neutral government and probably involves it in difficulties with the other belligerent, who suffers in proportion to his success in his unlawful enterprise.

"When a warlike expedition is fitted out on neutral ground against a belligerent, its individual members need not be

armed in order to bring it within the purview of the law, if only they are organized as soldiers and placed under military command."

The principles we have sought to establish are guides for the interpretation of the statute and establish the correct rule of construction.

Admitting that combination or organization to be necessary to constitute a military expedition, the presence of any aggregation of individuals on the same vessel bound for the same place, with the same object in view, might be claimed to constitute of itself proof of such organization. If this proposition is correct, Mr. Fish was certainly in error, for we see that the Frenchmen on board the Ville de Paris and the Lafayette had no tickets; the transportation was provided for them, and they must surely all of them, who desired to embark for the purpose of enlisting on the other side, been notified that these steamers would furnish such transportation.

Under the present state of affairs, it is impracticable for Cubans, who desire to join their countrymen, to take passage in the regular lines. They must then seek other means of transportation, and it is not unlawful for a number of them to undertake to cover the expense of transportation, or to go in a vessel, carrying arms, to those whom they desire to join.

It will probably be argued in support of the judge's comments on the conduct of the plaintiffs in error, that if secrecy is employed, it is an indication of a mutual understanding or combination sufficient to prove the crime.

It is not to be expected that a blockade runner shall advertise her departure, and Judge Brown in his opinion speaks clearly on this point.

The Court said in the Itata case "secrecy and deception cannot bring the case within the purview of the statute, if it is not otherwise in it."

Section 5286 does not provide any punishment for the men who take part in a military expedition, or who constitute the military expedition, for they cannot be said to begin, set on foot, provide or prepare the means for such an expedition. But they are nevertheless punishable in having enlisted. Those who organize them, or prepare or provide the means for their transportation when so organized, are those who are liable under section 5286.

Considering the two sections together, it is still more evident that a military expedition within the meaning of the act, primarily consists of men enlisted, in subordination to officers or leaders.

The statute requires also that this military organization, should be carried thence from the United States.

In this connection the doctrine of the Rand case and that of the Itata would seem to clash. It should be remembered that in the Itata case there were cannon on deck which were dismounted here; she took on board in Chile soldiers with their arms. If the decision in the Rand case is correct, that the mere shipping of arms from here, to be used by men picked up on foreign soil, constitutes a carrying on from the United States, it is difficult to see why any transportation of arms and munitions of war, for use of a belligerent force is not also a carrying out from the United States of a military expedition. Whether the men to be armed are on the shores of the hostile territory or on other contiguous foreign soil would seem in principle, if Judge

Butler is correct, to make no difference, in his construction of the words "carrying on from thence."

Such a construction would put an end to the traffic in arms and ammunition, which as we have seen, has always been held to be lawful by this Government.

The organization which we maintain is necessary as the basis of a military expedition, must have been completed within our territory or jurisdiction, otherwise it cannot be said to be carried on from the United States.

This Court laid down this principle in United States *vs.* Quincy (*supra*), where it was held that—

> "The intention with respect to the employment of the vessel should be formed before she left the United States, and this must be a fixed intention."

This is under section 5283, which prohibits any person from being concerned in the fitting out or arming of any vessel with intent that such vessel shall be used against a friendly power.

As to the proof of knowledge on the part of the plaintiffs in error that this was a military expedition, there is absolutely none, and under any aspect of the case there is certainly not the slightest proof of guilty knowledge or participation of the mates, Jens P. Petersen and Hans Johansen. Under the facts as proven any refusal on their part to proceed on the voyage would have been mutiny.

While the statute is sometimes called the neutrality act, it is an act to punish offenses against the United States by fines, imprisonment and forfeitures and the act itself defines the precise nature of these offenses. (Hoar, Att'y Gen., 13 Op. Att'y Gen., p. 179.)

As pointed out by Mr. Fish, it is not correct to speak of neutrality where there is no belligerency. Our Government will only be in a position to prescribe the duties and enforce the rights of a neutral, when it has recognized that a state of public war exists in Cuba as to which it behooves our Government to be neutral. This it has not yet done.

There can be no application of a neutrality law except there be neutrals. The penalties prescribed by the law might be enforced in time of perfect peace.

Under the section we are considering, until the recognition by this country of the belligerency of the insurgent Cubans, there is nothing to prevent Spain from fitting out and sending a military expedition to Cuba to put down the rebellion, provided, there is no violation of the law as to enlistment.

This penal statute cannot be so construed as to constitute any act as an infamous crime, except such is clearly defined and included in its language.

It is for this Court to determine, whether the facts or circumstances shown by the record in the case at bar, establish a "military expedition," within the meaning of the law.

We think the Court will be unable to distinguish the case from those to which we have adverted. In order to bring it within the definition of a "military expedition" and so establish a crime committed by the defendants, the court below resorted to conjectures and assumptions unsupported by evidence.

The controlling facts are not disputed.

The Cubans and a number of boxes, some of them containing munitions of war, were taken on board the Horsa

on the high sea and transported to the point from which they were disembarked.

It may be admitted that their destination was the Cuban army and that the intention of the men was to join the Cuban cause and assist in the liberation of their country.

But every fact repels the idea of a "military expedition" to be carried on from hence against the dominion of Spain.

The paucity of the number of the passengers on the Horsa, neither sufficient for offensive nor defensive operations, and the entire absence of a military organization in this country, show conclusively that no "military expedition" was started from hence.

The fact which seemed to impress itself upon the mind of the judge below, as evidence to support his conclusion, that there was an organization here of a military expedition, is that the men came on board of the Horsa in a *body* at the same time, accompanied by boxes some of which contained arms; and he relies on statements alleged to have been made by some of the passengers that they intended to go to Cuba and fight the Spaniards.

But such a state of facts does not constitute a "military expedition" nor any evidence of one.

The men had a right, so far as our laws are concerned, to join the Cuban army and to go to Cuba for that purpose, either singly or together. Nor were they forbidden by our laws to convey to such army munitions of war. Nor was the transportation of such men and contraband articles forbidden by the statute.

This the court below partially concedes but qualifies the concession by the statement "provided the persons had not

combined and organized themselves in this country to go to Cuba and make war on the government."

The court does not explain what was meant by the words "combined and organized." There was no evidence of any combination among the men previous to their departure.

But might they not have agreed among themselves to go to Cuba together and join the Cuban army without setting on foot a military expedition in this country?

It is apparent that in the use of the word "organized" the court did not mean a "military organization" in the sense in which that word is generally understood.

That the judge had no clear idea of the meaning of the word is apparent from that part of his charge where he says "they came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some description." (R., p. 39.)

As far as the carriage of the arms is concerned, the court acknowledged it was not a necessary factor in the solution of the question as to a "military expedition."

We do not contend that in order to constitute such an expedition the men should necessarily be drilled, put in uniform or organized according to tactics as infantry, artillery or cavalry. (Charge, R., p. 37.)

But we do maintain that the words "military expedition" must be given the significance they import.

The passengers on the Horsa were not armed when they left this country and did not proceed to the scene of the insurrection as an organized body capable of levying war. The statement of the judge that they were armed is a finding of a fact not warranted by any evidence. This statement was reinforced by the remark that the arms were *con-*

cealed in boxes. They did not constitute a hostile expedition which may not be permitted. They left our soil without engagements made in this country to enter the service of a belligerent. There was no military organization, no authority nor subjection.

If the Court should be of opinion that there was error in the ruling of the judge below on the subject of a military expedition, it would not be necessary ordinarily to decide the further question whether the defendants within the jurisdiction of the United States, provided and prepared the means for a military expedition to be carried on from thence by providing the transportation. But as suggested in the brief of the Government on the motion for advancement, it is desirous to ascertain what is the law which is to govern executive action.

The district judge held that if the defendants started from our jurisdiction under an arrangement or agreement to provide the transportation they should be convicted although the transportation was not actually furnished nor the men taken on board within our jurisdiction.

In order to avoid repetition of argument we will leave the discussion of the other questions of the case to associate counsel.

We submit that the judgment should be reversed, and a new trial ordered.

W. Hallett Phillips,
For Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1896. No. 986.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN.

Plaintiffs in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Paper Book of Plaintiffs in Error.

WILLIAM W. KER,
W. HALLETT PHILLIPS,
for Plaintiffs in Error.

D. J. GALLAGHER & CO., PRS., 245-7 N. BROAD ST., PHILA.

under in forces. They did not constitute a hostile expedition which may not be permitted. They left our soil without engagements made in this country to enter the service of a belligerent. There was no military organization, no authority nor subjection.

If the Court should be of opinion that there was error in the ruling of the judge below on the subject of a military expedition, it would not be necessary ordinarily to decide the further question whether the defendants within the jurisdiction of the United States, provided and prepared the means for a military expedition to be carried on from the same by providing the transportation. But as suggested in the brief of the Government on the motion for advancement, it is desirous to ascertain what is the law which is to govern executive action.

The district judge held that if the defendants started from our jurisdiction under an arrangement or agreement to provide the transportation they should be convicted although the transportation was not actually furnished nor the men taken on board within our jurisdiction.

In order to avoid repetition of argument we will leave the discussion of the other questions of the case to associate counsel.

We submit that the judgment should be reversed and a new trial ordered.

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1896. No. 986.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN,
Plaintiffs in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Paper Book of Plaintiffs in Error.

WILLIAM W. KER,
W. HALLETT PHILLIPS,
for Plaintiffs in Error.

D. J. GALLAGHER & CO., PRS., 245-7 N. BROAD ST., PHILA.

INDEX.

PAGE

History of the case 1
Analysis of the Government's Testimony 10
Transferred to the Horsa on the High Seas 10
Left the Horsa on the High Seas 10
Government's evidence of a Military Expedition 11
The Men had no Military Appearance 16
There was no Military Organization or Leadership 16
What was said by the Men 17
Testimony for the Defense 19
Government's witnesses contradicted 19
Testimony of Captain Wiborg 19
The case against the Mates 23
Assignment of Errors 24
Argument 32

Supreme Court of the United States.

OCTOBER TERM, 1895. No. 680.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN,

Plaintiffs in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PAPER BOOK OF PLAINTIFFS IN ERROR.

I. HISTORY OF THE CASE.

The steamship Horsa was a vessel sailing under the flag of Denmark, and the defendants below were some of her officers. J. H. S. Wiborg was Captain, Jens P. Petersen was First Mate, and Hans Johansen was Second Mate; they were all subjects of the King of Denmark; the crew

INDEX.

PAGE

History of the case 1
Analysis of the Government's Testimony 10
Transferred to the Horsa on the High Seas 10
Left the Horsa on the High Seas 10
Government's evidence of a Military Expedition 11
The Men had no Military Appearance 16
There was no Military Organization or Leadership 16
What was said by the Men 17
Testimony for the Defense 19
Government's witnesses contradicted 19
Testimony of Captain Wiborg 19
The case against the Mates 23
Assignment of Errors 24
Argument 32

Supreme Court of the United States.

OCTOBER TERM, 1895. No. 986.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN,
Plaintiffs in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PAPER-BOOK OF PLAINTIFFS IN ERROR.

1. HISTORY OF THE CASE.

The steamship Horsa was a vessel sailing under the flag of Denmark, and the defendants below were some of her officers. J. H. S. Wiborg was Captain, Jens P. Petersen was First Mate, and Hans Johansen was Second Mate; they were all subjects of the King of Denmark; the crew

were Danes or Norwegians, and Danish was the language used on the steamer. The Horsa, over two years ago, was chartered by the J. D. Hart Company of Philadelphia, and the charter had been renewed from time to time. By the terms of the charter, the steamer and her Captain were under the absolute control and direction of the charterer, and the Captain was compelled to go and take the steamer wherever the charterer would send him between the St. Lawrence River and the River Platte. She was employed in carrying freight and passengers, sailing from Philadelphia to various ports in Cuba and Jamaica; she made one voyage from Savannah to Africa, with a colony of about two hundred negroes; but she was employed principally in carrying merchandise to Cuba and Jamaica, and bringing cargoes of fruit from those islands to Philadelphia.

On November 9th, 1895, the Horsa cleared from Philadelphia for Port Antonio, Jamaica. She had on board, as a passenger, a lady who was the wife of the Chief Engineer; she also had on board, as cargo (p. 25) to be delivered in Jamaica, two row boats, a lot of empty boxes and barrels, two horses, some horse feed, and bales of hay and bags of corn, all of which were entered upon her manifest. Just before sailing, the Captain, as was customary, received a message or order from the Agent of the charterer; the message or order directed him (p. 25) after leaving the breakwater to proceed North near Barnegat and wait further orders. The pilot who piloted the steamer down the Delaware River, left her at the breakwater; and the Captain, in obedience to his orders, proceeded Northward. When opposite Barnegat, the engineers reported that a bearing was hot, and asked for an hour or two to fix it. The Captain stopped the steamer, and as a gale of wind was blowing from the North-West, he anchored her at a point between four and five miles off shore, and hoisted a white flag, which is the signal to show that the steamer was waiting orders, and was not in distress. About noon

on November 10th, the steam lighter Stranahan, from New York, having on board some men and boxes and baggage, came alongside the Horsa. One of the men, a colored man who was called a Pilot, delivered to the Captain of the Horsa an order in writing from the J. D. Hart Company (p. 25,) directing the Captain to take the men on board the Horsa, with their luggage and whatever they had, and to let them off wherever the bearer of the order would ask to be let off, and to deliver to them the two boats that had been shipped at Philadelphia. No extra food or other provisions for the men had been taken on board the Horsa at Philadelphia, but the order stated that the men had their own provisions with them, and were not to be provided for by the Captain or the steamer. The pilot and men and what they had with them were transferred from the lighter to between decks in the hold of the Horsa. There were 39 men, some articles of baggage, about 40 boxes, and two boats. About one-half of the men were Americans who used only the English language, and the other half spoke in a language supposed by the witnesses to be Spanish; they had no uniforms, and were all dressed as ordinary civilians or working men; they had no arms or weapons of any kind about their persons, had no apparent organization, and had no leader or person to give them directions. There were about 40 boxes, of different sizes and shapes, the largest being one about six feet in length. The boats were ordinary surf or row boats.

The crew of the Horsa consisted of twenty men, six of whom were firemen. After the men and boxes were taken on board from the lighter, five of the firemen, (four of whom at the trial were witnesses for the Government), at the instigation and under the leadership of Emil Fredericksen, one of their number, went on deck in a body to the Chief Engineer, and told him (p. 18) that they would not go on that voyage without extra pay. The Captain, who was passing at the time, inquired what was the

matter, and the Chief Engineer informed him of the demand made by the firemen. The Captain told the firemen to go below and mind their own business, as he was responsible. The firemen went below, the anchor was raised, and the Horsa proceeded on her voyage to Jamaica.

The voyage from Barnegat to Cuba is made in about five days, and to go to Jamaica requires nearly one day longer. The first land sighted is the Island of San Salvador or Watling Island, which, with a number of small islands, form what is called the Crooked Island Passage; then the large Islands of Cuba and San Domingo come in view, these and a large number of islands being visible from the deck of the vessel. And in proceeding to Jamaica, the vessel sails for about eight hours parallel with the coast of Cuba, between Cuba and San Domingo.

At first the men who were taken on board at Barnegat were sea-sick, and remained in the hold of the Horsa; then they began coming on deck. They lived upon canned goods and hard bread which they had with them in the boxes, and ate their food in the hold. Usually not more than ten or twelve of them were on deck at one time. Some of them had guns or rifles, some had machetes, and others had pistols. Those with guns or rifles carried the guns or rifles in their hands when walking about the deck, or stood them against the railings when sitting or laying down; the machetes were worn in a belt around the waist, or slung with a strap from the shoulder; the pistols were fastened to a belt around the waist; and some had a few cartridges in their belts. They brought on deck a small cannon, about the size of a ship's cannon, and variously described as three or four feet in length, which they set up on small wooden wheels, and left on the middle of the deck in the place usually occupied by one of the ship's cannon which was then in the hold. They were quiet and reticent, and only a few of them talked to or had any conversation with the witnesses for the Government.

On the night of the fifth day, when the steamer was between Cuba and San Domingo, and more than six miles off the coast of Cuba, and Cuba was not visible from the steamer, the colored pilot who had brought the order to the Captain off Barnegat, went to the Captain and asked him to stop the steamer and let him and the men off there. The Captain stopped the steamer and ordered all the lights to be put out. The four boats, being the two that had been taken on board off Barnegat and the two that had been shipped at Philadelphia, were lowered into the sea; one of the boats began to leak and could not be used, and the Captain sold the pilot one of the ship's boats to take the place of the leaking one. Some of the boxes were broken open, and a number of guns or rifles were taken out and wrapped in blankets, and the wheels were taken off the cannon; the pilot and men got into the boats, taking with them the cannon, the wheels, the blankets containing the guns or rifles, and some of the boxes. It was found that the boats would not hold all the boxes, and a number of them were left on the steamer. The pilot asked the Captain to tow the boats a little further; the boats were then fastened with a line to the stern of the Horsa, and the steamer proceeded, at slow speed, towing the boats parallel with the shore, for about fifteen minutes, when a light was seen in the distance. The Captain told the pilot about the light, the pilot asked to have the tow line cast off, the line was cut, and the boats drifted away from sight.

The night was intensely dark. When the men got into the boats and the boats were cast loose, the Horsa was far out at sea, and was more than six miles from the coast of Cuba. The witnesses for the Government testified (pp. 13, 15, 16, 19) that they could not see Cuba, and could not see land. What afterward became of the boats or the men and articles in them has never been known or ascertained, and the Government made no attempt to prove that either

the boats or the men or the articles in the boats ever reached the Island of Cuba.

The boxes that remained on board the Horsa were unopened, and not being entered on the ship's manifest, (p. 27), were by order of the Captain thrown overboard, to avoid the trouble which for that reason would arise with the Custom House Officers in Port Antonio, and the consequent seizure and detention of the steamer. On the arrival of the Horsa at Port Antonio, the Custom House Officers made a thorough search of the Horsa, but failed to find any irregularity. On the following day, at the request of the fireman Emil Fredericksen, the Custom House Officers made another search, and found, lying openly in the forecastle, a small canvas bag containing a few cartridges; but after investigation, the Captain and steamer were released from detention.

When the Horsa returned to Philadelphia, the fireman Emil Fredericksen made a statement to the Spanish Consul in that City, with the result that the Spanish Consul, on November 28th, 1895, swore out a warrant for the arrest of the Captain and two of the Mates, on the charge of providing the means for a military expedition from the United States to the Island of Cuba against the King of Spain with whom the United States was at peace; the charge was heard before United States Commissioner Samuel Bell on November 29th, 1895, and the defendants below were held on said charge, and entered bail to answer at the February Session, 1896, of the District Court of the United States at Philadelphia.

Emil Fredericksen took charge of the case and the procuring and fixing up of the witnesses. He and three other of the firemen were witnesses for the Government. At the trial he testified, (p. 21), "my wages were $25 a month; some time last November I went to the Spanish Consul; I went over to New York and hunted up the barge and tugboat, and the witnesses, and brought the

witnesses here; I took charge of this case; I started it; I catched it; I picked it up; I fixed the thing up; I saw the witnesses and fixed it up; I am not an American citizen; I have declared my intentions and want to become a citizen of the United States; I am a Dane; Denmark has some Islands down in the West Indies; when the Horsa was a Spanish Steamer down in those Danish Islands I won't keep quiet or say that was all right; I would not have the Spaniards do anything against my country, and I don't want a Dane to go against Spain; I get $17 a week, I get my money cash in Pinkerton's office, down on Chestnut Street." The other three firemen were taken in charge by the Spanish Consul, and although their wages as firemen were only $25 per month, yet from November 29th, 1895, till February 26th, 1896, they received from the Spanish Consul $2 per day and their board, besides receiving from the United States the usual fees for witnesses.

The case was called for trial on February 25th, 1896. Eleven witnesses were called and examined on behalf of the Government. Two of the witnesses, Arthur B. Hazlet and Frederick C. Lee, were from New York; Arthur B. Hazlet was a guest, and Frederick C. Lee was the engineer, on board the steam lighter Stranahan, and they were called to prove the transfer of the men and boxes from the Stranahan to the Horsa off Barnegat. Three of the witnesses, Joel Ridgway, Albanus Falkenberg and Clarence Crammer, were from Barnegat; they were connected with the light-house and life-saving station at Barnegat, and were called to prove that they saw a steamer off shore at Barnegat and a lighter go alongside of her; they gave the distance of the steamer from the shore as over three miles. Two of the witnesses, H. C. B. Murray and Jabez Bowen were Custom House Officers at Port Antonio, Jamaica, and were brought to Philadelphia and kept there till the trial to prove the finding of the small canvas bag with cartridges

in the forecastle of the Horsa when she arrived at Port Antonio, and also that they noticed some alteration in the painting of the funnel of the steamer and had her name painted over on her sides. The other four witnesses were Emil Fredericksen, Carl Arnston, Oscar Svensen and Ludwig G. Jensen, who were four of the firemen on the Horsa, and were called to prove what they saw and heard on the steamer.

Five witnesses were called and examined on behalf of the defendant. Three of them, Edward W. Paxis, Herbert P. Ker and Frederick Svanoe, were called to prove that machetes were knives used for agriculture and domestic purposes, and were usually worn by nearly every working man and boy in Cuba and the West India islands. The other two witnesses, Charles Bitholm who was the third engineer on the Horsa, and Dorothea Nelson who was the wife of the chief engineer and was a passenger on the Horsa, were called to prove what they saw and heard, and to disprove some of the facts testified to by the firemen. The defendant, J. H. S. Wiborg, who was captain of the steamer, also testified in his own behalf.

The case was argued before the jury by the District Attorney and his Assistant for the Government, and by the Counsel for the Defendant. The jury were charged upon the law and upon the facts by the Judge, Honorable William Butler. On February 26th, 1896, the jury rendered a verdict of guilty. A motion and reasons for a new trial were filed. At the same time a motion in arrest of judgment was filed, averring the want of jurisdiction of the Court. The several motions for a new trial and in arrest of judgment were argued and overruled and dismissed. On March 17th, 1896, sentence was passed upon the defendants. The defendant, J. H. S. Wiborg was sentenced to pay a fine of three hundred dollars and to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year and

four calendar months, and to pay the costs of prosecution. The defendants, Jens P. Petersen and Hans Johansen, who were mates of the steamer, were sentenced to pay a fine of one hundred dollars and to imprisonment in the Philadelphia County Prison for the term of eight calendar months, and to pay the costs of prosecution; but afterwards, at the request of their counsel, their sentence was reconsidered, and they were sentenced to pay a fine of one hundred dollars and to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year, and to pay the costs of prosecution. A petition on behalf of the said defendants was presented to Honorable George Shiras, Jr., Associate Justice of the Supreme Court of the United States, praying for a writ of error or appeal, and the admission of the defendants to bail pending the hearing of said writ, which petition was granted, and the defendants have given and entered bail pending the hearing of the writ of error aforesaid.

Assignments of error have been filed, relating to the want of jurisdiction of the Court, the admission of hearsay evidence, errors in the charge of the Court upon the law and upon the facts, the refusal of the Court to read some of the defendant's points of law to the jury, and to either affirm or refuse the same, the definition given by the Court as to what constitutes a military expedition, the expression of the personal opinion of the Court upon the evidence, the introduction of, and charge upon, matters and facts not contained in the evidence, in overruling the motion for a new trial, in dismissing the motion in arrest of judgment, and imposing sentences upon the defendants.

2. ANALYSIS OF THE GOVERNMENT'S TESTIMONY.

Transferred to the Horsa on the High Seas.

That the Horsa was more than three miles off the shore of Barnegat, when the men and what they had with them were transferred from the steam lighter Stranahan, was conceded. The testimony is as follows:

Frederick C. Lee, (p. 9), engineer of the steam lighter Stranahan. "She was anchored, I should judge, about four or five miles off shore. I think they can anchor there probably as much as ten miles off shore."

Joel Ridgway, (p. 10), Captain of the Life Saving Station. "She was not less than three miles off from shore."

Albanus Falkenburg, (p. 10), one of the life saving crew. "I do not suppose she was any shorter than three miles off. The vessel might have been more than three miles from shore."

Clarence Craumer, (p. 11), Keeper of the Barnegat Light. "The steamer was about three miles out, not any shorter."

Left the Horsa on the High Seas.

That when the boats were lowered, and the men got into them with their boxes and baggage, and the tow-line from the Horsa was cast off, the Island of Cuba was not in sight, was also conceded. What afterward became of the men or the boats or what was in the boats was not known and was not shown. The testimony is as follows:

Carl Arnston, (p. 13), fireman. "It was raining, and we could not see Cuba after we got the men in the boats."

Oscar Svensen, (p. 15), fireman. "I did not know it was Cuba, because I did not see any land."

Ludwig G. Jansen, (p. 16), fireman. "The night was dark as pitch. I don't know how far we were from land. I couldn't see land."

Emil Fredericksen, (p. 19), fireman. "We did not touch at Cuba; we passed it so that we could not see it."

GOVERNMENT'S EVIDENCE OF A MILITARY EXPEDITION.

The only evidence of what the men did, what they said, or what took place, to show that it was a military expedition, is as follows:

Frederick C. Lee, (p. 9), engineer of the Stranahan. "There was put aboard quite a number of cases, boxes of different kinds, different sizes, and different shapes."

Carl Arnston, (p. 11), fireman. "The boxes were put between decks; they were big and small boxes. I saw a big box there, about eight feet long, that had some wheels in it; the wheels were about four feet. I saw the muzzle or bore of a cannon; it was about six inches. The men hoisted the big box with a steam engine, and put it between decks. The men stayed on the vessel between decks. The men opened all the boxes; I saw them open one of them, the one that had the cannon in it, I can't tell how many they opened; I saw about twelve or thirteen boxes opened. I saw them take guns out of two boxes; they were guns and rifles; there was a short gun and a big one; they did not have any bayonets that I saw. Each man had a gun; they were doing nothing with the guns that I saw; they were not drilling that I saw; they did not have any soldier clothes on; they had a belt around here; they had swords about four feet long; I saw some of the men have belts, with machetes in them. They broke the big boxes open and took small boxes out of them; then they broke the small boxes, too, and took some guns and rifles out—guns and swords; the swords were about that size (indicating). The guns were distributed among the men; each man got a rifle and each man got a sword. The men did nothing that I saw in marching or drilling or anything of that kind. They did not have a commander aboard, as I can say. Only they had a big cannon

on board, and they fired once with that; they just placed the cannon in the middle of the ship; it was a big cannon, about five feet long, on wheels; they fired the cannon once; that is all I saw. It was night when the men got off. I do not know how far we were from Cuba. We could not see Cuba after the men got in the boats. I heard forty-eight boxes were thrown overboard; I saw the boxes but did not count them; somebody told me it was forty-eight; they were small boxes."

Oscar Svensen, (p. 14), fireman. "I was on deck several times and saw several boxes opened there, and in one of those boxes I specially saw was one machine cannon. I heard them shoot off that cannon, and went on deck to see what it was, and saw the smoke of it, that is all, and saw a man standing there talking; he talked some language, it was Spanish or some other language that I did not understand. I heard one of these men tell me he go down to Cuba, fight the Spanish; and they had these knives, they called them in Spanish machetes; they were knives and revolvers; the knives they hanged in a belt; they hang in a scabbard; I did not take much notice of them; they carried them in belts; I do not know that they were what they usually call a sword, such as officers carry. I saw some of these men have rifles. I saw two or three men were drilling and had some exercise, but I did not understand what they were talking about; I understood it was exercise, because he was talking to them and had different movements, and they lifted the rifles up, so I could understand that there was some exercise; it was only once." And, (p. 15), "These fellows had some belts around them to put some cartridges in, and they had small boxes that they took out of the big ones. Two men were sitting there, and one said to me, "these is going to kill a hundred Spanish with them," as much as I could understand. They took up different small boxes; they opened them and took some cartridges out of them

and put them in their belts. The chief gave them some canvas, and they made small bags that they carried these cartridges in." And, (p. 16), "All that I saw them doing on the vessel was they had rifles and cartridges, and I saw three men had some exercise one day there with the rifles; two of them were standing in line, and the third one gave them exercise. I don't know what the rest were doing. I only saw them exercising once. I saw the cannon; all I can say it was about five or six feet long and about half a foot in diameter; the wheels were about three or four feet. I did not see anybody firing a cannon off, but I heard it all right; I went right up so that I could see the smoke, too; I heard it only once. When we came down to Cuba I did not know it was Cuba, because I did not see any land."

Ludwig G. Jansen, (p. 16), fireman. "There were between thirty and forty men, and just as many boxes. When we came into smooth water they got some canvas and sewed some small bags to put cartridges in; you know what they have over their shoulders. They opened the boxes and took out all the rifles and gave each man one rifle; the men said there was 150 spare rifles after each man had got one; those were put into blankets; there was a big bale of blankets came aboard too, at the same time; all the rifles were wrapped up in blankets in small bundles, five in each, I guess, or something like that. The men didn't seem to keep a secret of where they were going or what they were going to do, they told plainly that they were going down to fight the Spaniards. Each man was given a rifle, and a sword or machete, I think; it was not a sword that they used here, not that any soldier used that I ever saw before; it was a sharp cutting instrument of some kind. Some of them had belts, and others hadn't. There was three kinds of cartridges and two kinds of rifles; there was small Winchesters for the cavalrymen and other big rifles

for the infantry ; that's what they told me. I know from the boxes they opened that there were four kinds of cartridges, one for the machine gun. The man in charge of the gun told me that was a Maxime repeat firing gun or something like that. I saw it worked and I saw them practising on it, and he showed me how they were doing it. I saw them when they fired a shot. I heard it was a French Canadian who had charge of the gun. It was a small light gun about four feet or four and a half. One day they were going to practice with the machine gun, and were going to open the boxes to get cartridges for the guns ; in one case there was a wrong mark ; I think they were talking Spanish ; they opened the wrong box ; they opened a box with medicines and bandages in it. The man in charge of the gun drilled with his men ; I should think he had about six or seven men ; he put every one of them in their right places ; I did not see any other drilling done aboard the ship—no other. I heard that every one that had a revolver was an officer, and they had different kind of swords, more like the swords they use here. There was one that seemed to be in command of them ; they called him Captain or something like that ; he was an old man ; he was said to be the man in command of the forty or fifty men. The small boxes were taken out of the big boxes that came aboard ; they were cartridges, I was told, for the Winchester rifles. I saw six men at drill at one time, drilling with the guns ; the only drilling was amidships ; the gun was not pointed over the side. I saw the man drilling with that gun once, in the daytime. The men were all going around the deck like ourselves, walking and lying around, and some sitting around. For each man I saw a rifle, because they always carried them around the deck ; they were walking around the deck with rifles. None of them had any bayonets. I know they were rifles by looking at the outside of them. I never handled a Winchester. I don't

know anything more than they told me. I do not speak Spanish ; they talked to me in English ; I should think more than half of them or about half of them, spoke English ; some of them were brought up in this Country, and some were born Americans. They took away with them all the boxes they could get into the boats. They did not throw any boxes overboard ; they left them there for the crew to throw them over."

Emil Fredericksen, (p. 19), fireman. "Aboard the steam lighter was about thirty or forty men and thirty or forty boxes of different sizes. They came aboard. On the way down, after we left Barnegat Light, the men emptied the boxes. There was a big one with a cannon in it ; that was the only one. There were others smaller, with two wheels. In the other boxes there were rifles—larger and shorter rifles—two sizes of rifles ; they put them in blankets. I saw the men drilling on their way down. I saw the cannon put upon a wheel and something put underneath, so that the cannon could stand up ; one man was standing behind and two standing there, and the officers had spoken only English were standing there. They were drilling, one was cleaning with some arrangement with the ammunition. They were only playing that—drilling. I did not see them make use of the rifles. They lost one rifle overboard. There was a man to look after the gear. There was a young fellow looking a little sick of it. I says, 'what's the matter with you.' He says, 'I don't care to go down there.' I says, 'what did you went for.' 'Oh, well,' he says, 'my father and mother was Cubans, and talked a long time to me, so I went.' The Cubans called one of these men Captain ; I don't know what he was, he only spoke the English language. About eight o'clock he says, 'well, when it comes—the gun boat here—will you men help us to fight.' He said that about two hours before they went into the boats. He

said, 'will you fight when there comes a Spanish gun boat,' He said that to me. 'We'll give you a rifle each.' Well, I say, 'I don't care.' He was the same man that drilled with a cannon. He was talking the English language. He did not speak Cuban himself, and had to get a man to speak for him. He was the man who had charge of the cannon. The cannon had wooden wheels with a ring around, and a little iron wheel—three wheels. It wasn't so heavy ; I should think two or three men could carry it easily. There were six or eight officers, but there was only one man that they called officer. The Cubans called him Captain. I don't know whether he was a Captain or not. I did not see the men drilling with the rifles. None of the men had soldier clothes on. We did not touch at Cuba ; we passed it so that we could not see it. The whole party of men and boxes left in the boats."

THE MEN HAD NO MILITARY APPEARANCE.

Frederick C. Lee, (p. 10), engineer of the Stranahan. "They were dressed the same as other people."

Oscar Svensen, (p. 16), fireman. "They dressed like you and me when they came on board."

Emil Fredericksen, (p. 21), fireman. "None of the men had soldier clothes on."

THERE WAS NO MILITARY ORGANIZATION OR LEADERSHIP.

The only testimony that in any way relates to organization or leadership of any kind among the men, is as follows :

Frederick C. Lee, (p. 9), engineer of the Stranahan. "Before we left King Street there was put aboard quite a number of cases, boxes of different kinds, different sizes, and different shapes. There seemed to be a man in charge of it. I heard him called 'Doctor.' It was done in quite

an open way. They did not seem to be afraid of anything."

Carl Arnston, (p. 11), fireman. "They did not have a commander aboard, as I can say. I heard the sailors tell it that the man who seemed to be in charge of the gun was a French grenadier."

Ludwig G. Jansen, (p. 17), fireman. "There was one that seemed to be in command of them. They called him Captain, or something like that. He was an old man. He was said to be the man in command of the forty or fifty men."

Emil Fredericksen, (p. 25), fireman. "They called one of these men Captain ; I don't know what he was. He was the same man that drilled with the cannon. He was talking the English language ; he could not speak Cuban himself, and had to get a man to speak for him. There was a man to look after the gear."

What was Said by the Men.

The only conversation between the Government's witnesses and the men on the Horsa, to show who the men were, where they were from, where they were going, or what their object or purpose was, is as follows:

Frederick C. Lee, (p. 10), engineer of the Stranahan. "There were two young men in the engine room there with me, and I asked them where they were going, and they said they were going to Cuba. They did not say what they were going to do. That is all the conversation I had with any of them."

Carl Arnston, (p. 12), fireman. "I was going in the forecastle one night, and he told me, 'I go down to Cuba to fight,' to fight the Spanish. I just asked him how much the Captain got out of it for bringing them down, and he said, 'he gets twelve thousand dollars for it.' I talked with only one."

Oscar Svensen, (p. 14), fireman. "I heard one of these men tell me he go down to Cuba, fight the Spanish." And (p. 15), two men were sitting there, and one of them said to me, 'these is going to kill a hundred Spanish with them,' as much as I could understand."

Ludwig G. Jansen, (p. 17), fireman. "The men didn't seem to keep a secret of where they were going, nor what they were going to do, so they told plainly that they were going down to fight the Spaniards. I don't know anything more than they told me. I do not speak Spanish. They talked to me in English. I should think more than half of them, or about half of them, spoke English. Some of them were brought up in this Country, and some of them were born Americans."

Emil Fredericksen, (p. 20), fireman. "About half of the passengers could speak the English language. There was a young fellow looking a little sick of it. I says, 'what's the matter with you.' He says, 'I don't care to go down there.' I says, 'What did you went for.' 'Oh, well,' he says, 'my father and mother was Cubans, and talked for a long time to me, so I went.' The Cubañs called one of these men Captain; I don't know what he was. About two hours before they went into the boats, he says, 'will you fight when there comes a Spanish gun boat; we'll give you a rifle each.' Well, I says, 'I don't care.' He was the same man that drilled with the cannon. He was talking in the English language. He did not speak Cuban himself, and had to get a man to speak for him."

3. TESTIMONY FOR THE DEFENCE.

Government's Witness Contradicted.

Charle Vitholm, (p. 24), third engineer. "I saw some men on deck, about twenty, all around the deck. Some of the men had guns in their hands, and some put them on the hatches and anywhere. It was about from ten to twenty guns that I saw. Some had guns and some had none. The men were not drilling ; if they had been drilling I would have seen them sure. Some of the guns were rifles—double barrelled rifles we would call them at home. I saw a cannon on board ; it was about three feet high. I did not see or hear that cannon fired off. If it had been fired I would have heard it. The ship was a small ship and I must have heard it. The men that I saw on deck were not dressed as soldiers. Some of them had knives—machetes ; they are banana knives, for cutting grass and to cut bananas."

Dorothea Nelson, (p. 23), wife of the chief engineer, and a passenger on the Horsa. "I was on deck most of the day. I saw men on the ship differing from the crew and officers ; about fifteen or twenty men. Some of them had guns ; I did not notice how many, but I saw from ten to twelve at one time ; the men were dressed like the crew of the ship ; they had all kinds of clothing on ; they were not dressed like soldiers ; some of them had belts. I did not see any drilling at any time. I saw a cannon on board, about three feet high and three feet long. I did not hear the cannot fired during all the time I was on the vessel. It could not be fired without my hearing it."

Testimony of Captain Wiborg.

"Before sailing (p. 25), I received a message, which was, after I passed the breakwater to proceed North near Barnegat and wait further orders. I stopped off Barnegat,

between four and five miles off shore, as near as I can judge, and anchored. A tug or lighter came to us; in the tug were a lot of men; there was a man brought me a message from John D. Hart Company. It was in writing. He told me to take those men and luggage and whatever they had aboard the Horsa and let them off whenever they called for it to be let off. The boats that I had shipped in Philadelphia were cleared for Port Antonio, Jamaica, and the first intention was to deliver them at Port Antonio. The order was, they had a colored man there that they called the pilot, and whenever he called for them to be let off I should let them off and give them the boats. The men walked through the port on the between decks; the ship had three decks; the between deck was the second deck of the ship. They had a lot of boxes and their luggage, and they were stowed away on the between deck. The boxes were of different sizes; the largest was about six feet long; there was no block or tackle used in hoisting them up; they were all lifted aboard; a tackle was used to hoist the boats aboard. The men got off about six miles off the Cuban coast. The colored man that they called the pilot came and told me to let them off. I stopped the steamer and lowered the boats in the water. The men got off through the ports. They took their boxes with them, not all of them, but the biggest part of them. They did not have enough boats. At first they had four boats, and I sold a boat to them. It was not my boat, it belonged to the owners of the ship. The boats were lowered aft and they were all tied to each other at the stern. I towed them about fifteen or twenty minutes along shore, and I saw them leave the ship."

"When the men came aboard they had not the appearance of soldiers. When I started from Philadelphia I did not know that we were going to take these people and their goods on the Horsa. According to my opinion I

had no right to refuse to take them. My charter called for me to go wherever the charterer sends me between the St. Lawrence River and the River Platte."

"Nobody was carrying guns when they got on my boat. Some of the men on the ship had guns. I do not know where they got them. I saw about half a dozen. It did not attract my attention because the men had guns. I have often seen passengers carrying guns aboard my ship. I have gone to Africa and to Cuba and Savannah and different ports; on the African expedition they had about 150 guns. I did not see the men drilled. I saw the cannon, but did not examine it; it did not attract my attention because it was a small gun, a cannon about the same size as the ship's cannon, say about three and a half feet long. I did not notice it at first. I did not know it was my own or theirs when I first saw it; when I first saw it I thought it was my own. That cannon was not fired on board. I slept in the chart room and the cannon was standing right in front of it; I did not hear it fired. I did not see any of the boxes broken open, and did not know that the boxes were broken open and arms taken out. Some of them had machetes; I saw plenty of them before; they would not attract my attention. When the men got in the boats the men had their guns and their machetes. Some of them had guns and some had not."

"When (p. 28) I was taking the men and their boxes on board, I did not know there was anything wrong in it. I did not suppose there was anything wrong in it. I do not know where they went to. I do not know whether they went to Cuba or not; all I know is I left them out at sea, about six miles off the coast. None of the men told me they were going to Cuba. The pilot did not tell me where he was going. I did talk to him, but he could talk very little English. I did not think there was anything wrong about it. I did not think it was of any consequence that my vessel was boarded on the high seas by a tug, by

a lot of men with boxes and things ; that did not strike me as particularly important."

By THE COURT :

Q. And that did not strike you as an unusual or uncommon thing ?

A. No, sir ; that did not strike me as anything unusual.

Q. That they should be let off wherever they asked to be let off and take the boats with them ; that indicated that they were to be let off at sea somewhere, did it not ?

A. Yes, sir ; it did.

Q. Did it not strike you as unusual that these men were to be taken on board and turned out on the sea with the boats ?

A. No ; it did not.

By MR INGHAM :

Q. Have you ever had an experience of that kind before in your whole life as a navigator ?

A. Yes ; I have had it on the coast in Jamaica and Cuba.

Q. Have you ever had an order to receive a number of men and boxes on the high seas and let them off whenever they wanted to get off.

A. Not boxes, but I have had them on the coast in Jamaica ; when they got on the boat, and whenever they wanted to be let off I let them off before.

"I have before taken people down to the Island of Cuba and landed them, not at a port, but at some other place. It is the custom down in that place, among those islands, for people to come in boats on the vessel and to pile their goods on the vessel ; they might pay the agent for it ; they did not pay me anything ; they go in that way from port to port. I have been into different ports in Cuba and went from there along the coast and picked up fruit along the coast ; they are not clearing ports, and when people come on board they were taken to other places on the Island ; there is nothing unusual or uncommon in it."

"I did not get any extra compensation myself. I will

swear to that. I do swear that I neither directly or indirectly get a greater compensation than usual on account of this trip of the Ninth of November last year."

The Case Against the Mates.

Captain Wiborg testified, (p. 28), "These men (pointing to the two Mates who are defendants) had nothing to do with this ship or with this business. They listened to my orders. They were under my orders. I was the Master of that vessel. I am responsible for all that was done."

The above is the only evidence that in any way relates to the Mates, excepting the testimony of Ludwig G. Jansen, (p. 22), that these defendants were two of the Mates of the vessel on that voyage.

4. ASSIGNMENT OF ERRORS.

1. The Court below erred in overruling the objection of the defendants to the testimony of Frederick C. Lee given in the form of questions and answers, and admitting as evidence the said testimony of the said Frederick C. Lee, who was a witness for the prosecution, and who was engineer on the steam lighter Stranahan, the said testimony being in relation to a conversation on the Stranahan between the witness and two persons who had been taken off the tug Cham by the Stranahan, and were being conveyed by the Stranahan to the defendants' ship Horsa; the questions, answers and testimony being as follows:

Q. Did you have a conversation with some of these young men you took off of the Cham and they told you they were Cubans?

A. Yes, sir.

Q. Did they tell you where they were going?

(Objected to, as to anything that was said or took place on the boat in the absence of the defendants.)

(Objection overruled. Exception by defendants.)

A. Yes, there were two young men in the engine room there with me, and I asked them where they were going, and they told me they were going to Cuba.

2. The Court below erred in overruling the objection of the defendants to the testimony of Carl Arnston, a witness for the prosecution, who was a fireman on the defendants' steamer Horsa, the said testimony being in relation to a conversation on the steamer Horsa after leaving Barnegat and during the course of the voyage, between the witness and one of the persons on board the Horsa, the questions, answers and testimonies being as follows:

Q. Did you have any talk with any of these men?

(Objected to, unless it was in the presence of these defendants. Objection overruled. Exception by defendants.)

Q. You say you had a conversation with them?

A. Yes, sir.

Q. Tell us what they told you?

A. I was going to the forecastle one night, and he told us, "I go down to Cuba to fight."

Q. To fight who?

A. The Spanish.

Q. How many men did you talk with?

A. Only one.

3. The Court below erred in charging the jury as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its Government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service; nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry; it is sufficient that they shall have combined and organized here to go there and make war on the foreign Government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel, that were that question required to be decided, I should hold that it is not necessary; nor is it important that they intended to make war as an independent body or in connection with others."

4. The Court below erred in not reading to the jury all of the defendants' third point, and erred in not affirming the said point, the said point being as follows:

"3. That it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies, and arms and munitions of war, on the same ship; that in such case the persons transported, and the shipper and transporter of the arms, run the risk of seizure and capture by the foreign power against whom the arms were to be used, and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty."

The answer to the said point being as follows:

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the Government. If they had so combined and organized and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country, for such a purpose, would be an offense against the statute."

5. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' fourth point, which is as follows:

"4. That the laws of the United States, and the Section under which the defendants are indicted, do not prohibit transporting of arms or of military equipments to a foreign country, or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country."

6. The Court below erred in not reading to the jury,

and either affirming or refusing the defendants' fifth point, which is as follows:

"5. That before the jury can find the defendants guilty under this indictment, they must first find that there was a "military expedition or enterprise" against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry or artillery, and officered and equipped for active hostile operations.

7. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' sixth point, which is as follows:

"That if the jury find that there were transported on board of the Horsa arms and men, but the same were not a military organization as infantry, cavalry or artillery, and officered and equipped, or in readiness to be officered and equipped, then the jury must find the defendants not guilty."

8. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' seventh point, which is as follows:

"7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country, or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of capture of his property and the other of the capture of his person by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any

offense against the laws of the United States, and would not be liable under this indictment."

9. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' eighth point, which is as follows:

"8. That if the jury finds from the evidence in this case, that the officers of the steamship Horsa took on board, off the coast of New Jersey, on the high seas, a number of men; all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and munitions of war, but that the said men were not organized as infantry, cavalry or artillery, or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army."

10. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' ninth point, which is as follows:

"9. That if the jury find, from the evidence, that the defendants took on board their vessel, off the New Jersey coast, a number of men, unarmed, and not organized either as infantry, cavalry or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army."

11. The Court below erred in charging the jury, in answer to the defendants' twelfth point, as follows:

"I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction, they did not commit an offense, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this be true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted. If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat."

12. The Court below erred in charging the jury as follows:

"The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body, and appeared to be acting in concert under an organization or understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition."

13. The Court below erred in charging the jury as follows:

"That this was a military expedition, designed to make war against the Government of Spain, would seem to the Court to be free from reasonable doubt."

14. The Court below erred in charging the jury as follows:

"Thus you see what the defendants did; from this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its object were, and had arranged and provided for its transportation when they left Philadelphia, or left our shores within the three mile limit stated. If they were ignorant on this subject until they anchored off Barnegat Light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country. The question, therefore, is, did the defendants understand they were to carry this expedition, and had provided for it, and understand what the expedition was before leaving here. As you have seen, they took on two extra boats before starting, and cleared for Point Antonio, and turned off of their course at the breakwater, the Captain explaining this, to which explanation you will give whatever weight you deem it to be worth."

15. The Court below erred in charging the jury as follows:

"The Captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of and provision for what they were about to do."

16. The Court below erred in charging the jury as follows:

"We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder,

violation of trusts, as the result of want of faithfulness in executing the law."

17. The Court below erred in overruling the defendants' motion in arrest of judgment, and the reasons therefor, which reasons are as follows :

"1. Because this Court has no jurisdiction over these defendants, or to pass or impose sentence upon these defendants.

"2. Because although the indictment charges that these defendants committed an indictable offense within the jurisdiction of this Court, yet the uncontradicted testimony shows, that the defendants are subjects of the King of Denmark, that they were in charge of a Danish vessel, that the men and boxes were taken on board the said vessel on the high seas, beyond the three mile limit, and beyond the jurisdiction of the Courts of the United States of America, and no overt act or offense, as charged in the said indictment, was committed by the defendants or either of them within the jurisdiction of this Court or any other Court in the said United States of America, and therefore this Court is without jurisdiction to try these defendants or to impose sentence upon them."

18. The Court below erred in overruling the defendants' motion in arrest of judgment.

19. The Court below erred in passing sentence upon the defendants.

20. The Court below erred in sentencing the defendants to confinement in the Penitentiary.

ARGUMENT.

Assignments of error 9, 10 and 11 relate to the jurisdiction of the Court. The undisputed evidence was, that the Horsa was a foreign vessel sailing under the flag of Denmark; that she was chartered and employed by the J. D. Hart Company of Philadelphia in the lawful business of carrying freight and merchandise to and from Philadelphia; that she left Philadelphia under her charter, with a cargo, lawfully cleared from that port, bound for the Island of Jamaica; that before sailing her captain received orders from the charterer to proceed north near Barnegat and await further orders; that after leaving Philadelphia she was anchored at a point in the ocean more than three miles from the shore at Barnegat; that the boxes were taken on board the steam lighter Stranahan at Brooklyn in New York; that the men were taken on board the Stranahan, after she left New York Bay, at some place off the coast of New Jersey; and that the men and boxes, under orders from the charterer, were transferred from the Stranahan to the Horsa at the place where the Horsa was anchored off Barnegat. The Court, in the eighth, ninth and twelfth points of law presented on behalf of the defendants, was asked to charge and instruct the jury, that under the evidence, the transportation of the men and boxes, and taking them on board the Horsa, were not acts performed within the jurisdiction of the Court, that the defendants did not commit any offence within the jurisdiction of the Court, and that the jury must find the defendants not guilty. The indictment contained only a single count, charging that the defendants "at the Port of Philadelphia, Pennsylvania, within the jurisdiction of the Court, did begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from THENCE against the Territory and Dominions of a foreign Prince, to wit,

against the Island of Cuba," etc. There was no conspiracy count or charge in the indictment. The Court stated the issue to be (p. 37) the charge of "providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc." The Court did not read to the jury either the eighth or the ninth points; but in answer to the twelfth point, charged and instructed the jury:

"I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction, they did not commit an offence, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted. If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat."

Assignment of error 17 should also be considered in this connection. It relates to the Court overruling and dismissing the motion in arrest of judgment, the motion averring the want of jurisdiction of the Court.

It is contended, that merely furnishing transportation, or transporting the men with their boxes and baggage from one place to another, would not be the criminal act or offence of "providing and preparing the means for a military expedition," described in and prohibited by section 5286, under which the defendants are indicted; and even if it were, no offence would have been committed, and no criminal act would have been performed, until the transportation had actually commenced.

If the men and boxes constituted a military expedition, taking them from New York would be an overt act that would not be within the jurisdiction of the Court in Philadelphia; nor would taking the men on board a foreign vessel out on the ocean be an act performed within the jurisdiction of the Court in Philadelphia. To enter into an "agreement," or enter into an "arrangement," in Philadelphia, to "furnish and provide the means of transportation," is not made an indictable offence under section 5286; and even if an agreement or arrangement were entered into in Philadelphia, and the transportation was to be from another place, beyond the jurisdiction of the Court, the Court within whose jurisdiction the overt act was performed would alone have jurisdiction to try the persons performing the act. This is the law as laid down in the text-books, and has not been changed by any decision that has been found.

"The rule in misdemeanors is, that all who participate in them, whether present or absent, are indictable in the County in which they are committed." 1 *Bishop on Criminal Procedure*, sec. 57.

The same principle is laid down and illustrated in *Wharton's American Criminal Law*, Vol. I, sec. 604.

Assignments of error 1, 2 and 12 relate to the Court admitting, as evidence against the defendants, alleged conversations between the men who were taken on board the Horsa and the witnesses for the Government, and statements of the men not made in the presence of the defendants. The indictment charges that it was a military expedition against the Island of Cuba. The only evidence to show that the men were going to Cuba was the testimony given by the engineer of the lighter Stranahan and the four firemen of the Horsa, of conversations between those witnesses and the men on board the vessels, and statements made by the men, not one of which con-

versations and statements took place or were made in the presence of the defendants, or either of them. If those conversations and statements had been ruled out by the Court, as they should have been, the defendants would necessarily have been acquitted. The Court not only admitted the testimony, but charged and instructed the jury (p. 39) as follows:

"Some of them who were able to speak English declared that they were Cubans going to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition."

It is respectfully contended that the learned Judge erred not only in his statement of the law, but seriously erred in his statement of facts. The testimony shows that more than half of the men spoke the English language, and there is not a line nor a sentence in the entire testimony that shows or indicates that even one of the men stated that he was a Cuban. The evidence was hearsay, it should not have been admitted, and it was error on the part of the Court to instruct the jury to regard it.

Declarations by third persons in reference to the offence with which the defendants are charged are hearsay, and consequently inadmissable in evidence. Hence, evidence of what a living though absent witness testified in the former trial is inadmissable. *Wharton's American Criminal Law*, sec. 662.

In conspiracy, a foundation must first be laid by proof sufficient in the opinion of the Judge to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such facts. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object,

is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them. When conversations are proved, the effect of the evidence will depend on other circumstances, such as the fact and degree of the prisoner's attention to it, and assent or disapproval. 1 *Greenleaf on Evidence*, sec. 111.

The general rule of law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses. 1 *Greenleaf on Evidence*, sec. 124.

The language used by the learned Judge in his charge to the jury is identical with that set forth in *Greenleaf on Evidence* in relation to conspiracies. The defendants were not indicted for a conspiracy, and the rules of evidence in conspiracies did not apply in their case.

Assignments of error 5, 6, 7, 8, 9 and 10 relate to the Court not reading to the jury, and either affirming or refusing, the fourth, fifth, sixth, seventh, eighth and ninth points of law presented on behalf of the defendants. The learned Judge mentioned the points in their numerical order, and said, "are fully answered by what has been said." All that had been previously said by the learned Judge was in definition of a military expedition, and did not relate to the particular points of law upon which the Court was requested to charge the jury. The sixth, eighth and ninth points related to the want of jurisdiction of the Court, and had not been previously commented upon, and were not in the subsequent part of the charge referred to or answered. The defendants were deprived of the benefit and advantage that might have been derived by them by the points having been read to the jury, and properly considered by the Court.

Assignments of error 3, 4, 12 and 13 relate to the

definition given by the learned Judge of a military expedition, and the charge and comments upon the same.

Assignment of error 13 relates particularly to the charge and instruction of the Court upon the evidence, which was, "that this was a military expedition, designed to make war against the Government of Spain, would seem to the Court to be free from reasonable doubt." It will be remembered that the only evidence that it was a military expedition was contained in the testimony of the four firemen, and that the only evidence that the men were going to Cuba was contained in the testimony of the engineer of the Stranahan and the four firemen of the Horsa, of conversations with the men that were taken on board the Horsa. It will also be remembered that it was not known what became of the men or boats after they left the Horsa, and no attempt was made to prove that they ever reached the Island of Cuba. It is true that the Court added, "The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only," and concluded the charge with the remarkable assertion (p. 41), "We are suffering to-day as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law."

The learned Judge gave the jury his definition of a military expedition, and instructed them that such was the law. He gave them his opinion that the facts showed it was a military expedition to make war against the Government of Spain, and instructed them that it was free from a reasonable doubt, which the jury were bound to accept as the law. He reminded them that the responsibility of deciding the case according to his instructions rested upon them, and informed them of the suffering our people were undergoing from the want of faithfulness in executing the law. There was no evidence whatever to show

that our people were suffering from lawlessness, from mobs, lynch law, murder, or violation of trusts. The defendants were entitled to a fair and dispassionate charge that would leave the minds of the jury free to decide the issue solely upon the law and the evidence. The language of the Court was a command coupled with a threat.

Assignments of error 14 and 15 relate to the charge of the Court concerning the facts, whether the defendants understood what the expedition and its object were, and had arranged and provided for its transportation when they left Philadelphia, and the explanation given by the Captain.

The learned Judge charged, "The Captain says he was ignorant of the service required of him until he reached the point near Barnegat; you must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of and provision for what they were about to do." The Captain stated that he was ignorant of the service required of him, and there was no contradiction of his testimony. The Government did not prove or attempt to prove that the Captain or either of the other defendants had any knowledge of what they were going to Barnegat for. The Captain's testimony stood alone, and there was no other evidence for the jury to consider. The charge of the Court for the jury to give the Captain's evidence "what ever weight youdeem it to be worth," and, "you must judge whether he should be believed or not," amounted to a direction to the jury to doubt the testimony of the Captain, where no doubt should have arisen, and was an indirect intimation to the jury that the testimony should not be believed. A doubt, if any existed, should arise from the evidence, and not in the mind of the Court or the jury. If there were any evidence which the jury

should consider in connection with that of the Captain, the Court should have called the attention of the jury to the particular evidence to be considered, and not confine the criticisms and instructions to the testimony of the Captain alone. In the case of the Mates, there was no evidence whatever to show that they had anything to do with the transaction other than the fact that they were employed as Mates on board the Horsa, and it will be remembered that the Captain testified that the Mates had nothing to do with the matter, that they were under his instructions, and that he alone was responsible.

Assignment of error 16 relates to the charge to the jury as follows: "We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law." There was no evidence of any of the facts stated by the Court. There was no reference made to them in any way during the trial. They were matters and facts introduced by the Court alone, at the end of the charge, coupled with an earnestness, impressiveness and gesture that could not fail to impress the jury most unfavorably against the defendants.

It is protested on behalf of the defendants that the learned Judge had no right or authority to charge and instruct the jury as above, and that the charge and instructions did them great injustice.

Assignments of error 17 and 18 relate to the Court overruling and dismissing their motion in arrest of judgment, the motion averring the want of jurisdiction on the part of the Court.

The offence, if any, was not committed within the jurisdiction of the Court. The indictment averred that the offence was committed within the jurisdiction of the Court. To

the indictment the defendants entered a plea of not guilty. The want of jurisdiction did not appear until the evidence was taken, and the evidence showed that the men and boxes were taken on board the Horsa, a foreign vessel, on the ocean and beyond the three mile limit from the shore.

Assignments of error 19 and 20 relate to the passing of sentence upon the defendants, and in sentencing the defendants to be confined in the penitentiary.

Section 5286 provides, "Every person who, . . . shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years." The imprisonment mentioned in the section is simple imprisonment, and does not warrant the infliction of infamous punishment. Confinement in the penitentiary is an infamous punishment.

Section 5541 provides, "In every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period longer than one year, the Court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the State for that purpose."

Under the laws of the State of Pennsylvania, prisoners convicted in the court where the defendants were convicted can be confined either in the county prison or in the penitentiary.

After conviction, Captain Wiborg was sentenced to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year and four calendar months; and the Mates were sentenced to imprisonment in the Philadelphia County Prison for the term of eight calendar months. Afterward, in order that they might not be separated, the counsel for Jens P.

Petersen and Hans Johansen stated to the Court that those defendants would prefer to take a sentence for a longer time and go to the penitentiary, whereupon the Court sentenced them to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year. The counsel for the defendants protested to the Court that the Court had no authority to sentence any of the defendants to the penitentiary, but the Court claimed the right to pass the sentence, and sentenced the defendants accordingly.

It is contended that as the Legislature of the Commonwealth of Pennsylvania has given the Court the right to sentence the defendants to the Philadelphia County Prison, that the Court has no right or authority to sentence the defendants or either of them to confinement in the Eastern Penitentiary.

WILLIAM W. KER,
W. HALLETT PHILLIPS,
For Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
MAY 16 1896
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

J. H. S. WIBORG, JENS P. PETERSEN, AND Hans Johansen, plaintiffs in error,
v.
THE UNITED STATES.
No. 986.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

J. H. S. WIBORG, JENS P. PETERSEN, AND Hans Johansen, plaintiffs in error, v. THE UNITED STATES. } No. 986.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

A party of filibusters, sailing clandestinely from New York, were received on board the steamer *Horsa* on the high seas off the New Jersey coast, and effected a safe landing at night on the coast of Cuba. The *Horsa* had sailed from Philadelphia in concert with the filibustering party. Its captain and mates were indicted therefor under Rev. Stat., § 5286. They were tried before Judge Butler and a jury and convicted, and bring this writ of error.

STATEMENT OF FACTS.

It is matter of history, of which the court will take judicial notice, that Cuba is a colony of Spain. It is also a part of the history of the times, and has, indeed, been officially announced in a proclamation by the President of the United States, that there is an insurrection in Cuba against the Spanish Government. This fact is expressly admitted by all the plaintiffs in error; and they admit that it was known to themselves. (Rec., p. 22.)

The *Horsa* is a Danish steamer and sails under the Danish flag. The defendant Wiborg, captain of the steamer, is a subject of the King of Denmark. The other defendants, also, are claimed by their counsel to be subjects of the King of Denmark; but this fact does not appear of record.

The *Horsa* sailed from Philadelphia November 9, 1895, between six and seven p. m., bound ostensibly for Port Antonio, Jamaica. It was a vessel engaged in the fruit business for John D. Hart & Co., of Philadelphia, and was bound for a cargo of fruit. It carried very little cargo on sailing. Among the things which it did carry were two boats, which were cleared for Port Antonio (pp. 11, 25).

When the vessel passed the Delaware breakwater, her proper course would be southward. She turned, however, to the northward, went up the Jersey coast to Barnegat light, and anchored in the high seas between three and five miles off from the shore (pp. 9–11). Captain Wiborg in his testimony states that this was due to a message

received by him before sailing, "which was, after I passed the breakwater, to proceed north near Barnegat and wait further orders" (p. 25).

Between ten and twelve on the same evening the steam lighter *J. S. T. Stranahan* sailed from Brooklyn, carrying as cargo some cases of goods and two lifeboats, which had been put on board by the crew of the lighter during the evening. In the lower bay of New York below Staten Island, during the night, she took on board between 30 and 40 passengers, mostly dark-complexioned men speaking a foreign language, apparently Cubans or Spaniards. The lighter then ran down to Barnegat, where she saw a steamer under a white flag. She then also ran up a white flag, went alongside, and put aboard her passengers, with the cases of goods and the lifeboats. The steamer which they boarded was the *Horsa* (pp. 8, 9, 19, 25–6).

Captain Wiborg saw the boarding done, and assented. His firemen complaining, his answer was, according to his own testimony: "I told them if anybody had to hang for this, I would be the man to hang for it" (p. 31).

He testifies that a man on the lighter brought him a message from John D. Hart & Company: "He told me to take those men and luggage and whatever they had on board the *Horsa* and let them off whenever they called for it to be let off. I shipped two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia. * * * The only order was they had a colored man there that they called the pilot, and whenever he called for them to be let off

I should let them off and give them the boats. * * * Deliver them to these men as soon as they called for them" (pp. 25–6). "The pilot did not tell me where he was going. I did talk to him, but he could talk very little English." The captain was informed that the party were going to Cuba, and believed it to be a party bound for the Cuban insurrection, but was careful to ask no questions, and considered his own part in the affair to be legal (pp. 30, 31, 33).

After boarding the *Horsa* the new passengers broke open the boxes which they had brought with them and took out rifles, swords, and *machetes*, and one cannon. They also had cartridge belts, medicines, and bandages with them (pp. 11, 15, 17, 20). They were not uniformed, but one witness states that most of them had with them caps with a little flag, which they told him was a Cuban flag (pp. 14, 15). They brought their own food with them (pp. 27, 30). Defendants' witnesses deny having seen rifles in the hands of all of the men, but the prosecution's witnesses swear that when they divided up the arms every man had a rifle; that certain men, understood to be officers, had swords and revolvers; that one seemed to be in command of them, and that this commander asked some of the crew whether they would fight if attacked by a Spanish gunboat (pp. 11, 17, 18, 20).

The prosecution's witnesses also testify that there were some slight military exercises in the nature of drilling by from three to seven men at a time (pp. 14, 16, 17, 19, 21). The passengers stated they were going to Cuba to fight the Spaniards (pp. 12, 14, 15, 17). On the second

day out the passengers made small canvas bags to put cartridges in; unpacked a bale of blankets which they had brought with them, wrapped their 150 spare rifles in these blankets in small bundles, about five in each, and threw the boxes overboard in which the rifles had come; took a rifle and a sword or *machete* apiece and practiced with these and the cannon. There were three kinds of cartridges and two kinds of rifles. One of the witnesses states that, as he was informed by them, there were small Winchesters for the cavalrymen and big rifles for the infantry; big revolvers for the officers; and the cannon was a Maxim gun, in charge of a French-Canadian (p. 17).

Some testimony was introduced on behalf of the defendants to the effect that the *machete* is generally carried by inhabitants of the West Indies, and has many peaceful uses. The testimony is immaterial in view of the fact that there is ample evidence that the men had rifles and ammunition also. In fact, it is a matter of common knowledge that the *machete* is used for both war and peace, being a variety of cutlass. The Century Dictionary defines the word as follows: "A heavy knife or cutlass used among Spanish colonists and Spanish-American countries both as a tool and as a weapon." One of defendants' witnesses admitted that it was a formidable weapon, and, moreover, that he had never seen citizens carrying guns in Cuba (p. 24).

After leaving Barnegat the *Horsa* took the usual course for Jamaica, which follows the Cuban coast for about six hours (p. 26). There is testimony to the effect that she had meanwhile taken steps to conceal her identity by

having her funnel repainted. While at sea, and about six miles off the coast, the colored pilot gave orders to disembark (pp. 26, 28, 30) The disembarkation was conducted under the supervision of Captain Wiborg, who had the lights of the vessel put out, and it occurred about eleven at night. The two boats were launched which had come on board at Philadelphia, and also those which had come with the lighter. As those were not enough, Captain Wiborg sold the men one of the ship's boats. As one of the boats leaked, another boat was lowered from the ship. The passengers took to the boats, carrying with them all the arms and ammunition which they could carry. The steamer then undertook to tow the boats, but a strange light was seen in the distance, and so, at request of the men, the captain cut the boats loose and started away at full speed (pp. 12, 16, 18, 19, 26, 32). Some boxes of cartridges had been left on the *Horsa*, because there was not room for them on the vessel. Captain Wiborg now directed that these should be thrown overboard. He states that this was to avoid getting into trouble at Port Antonio, since the boxes were not manifested for that port (pp. 12, 27, 28). The *Horsa* then completed its voyage to Port Antonio.

Counsel claim that it does not appear where their clients were going when cut loose by the captain. It is difficult to guess where else than to the nearest land they could be going, when cut loose in small boats, loaded down with arms, in the Caribbean Sea, in the hurricane season.

The section under which this prosecution was instituted is contained in Title LXVII of the Revised Statutes, which bears the heading "Neutrality." The contents of this title are commonly known as the "Neutrality Laws." Their operation, however, is not confined to the enforcement of neutrality in the strict sense of the word; that is, their operation is not dependent upon the existence of a state of belligerency between foreign powers. (13 op. 177, 178; *United States* v. *O'Sullivan*, 9 N. Y. Leg. Obs., 257, 268; *The Ilata*, 56 Fed. Rep., 505, 511.) The heading is new. The main contents of this title, including the section involved in the case at bar, are derived from the "Act in addition to the act for the punishment of certain crimes against the United States" of June 5, 1794, ch. 50, and the "Act in addition to the 'Act for the punishment of certain crimes against the United States' and to repeal the acts therein mentioned" of April 20, 1818, ch. 88.

The history of this legislation is not of particular significance in connection with the interpretation of the section now under consideration. It has, however, been so much discussed that it may be well to state it briefly.

The obligations of the United States as a neutral nation first became an important subject of discussion when the wars of the French Revolution broke out in 1792. In the following year Citizen Genet, the famous French Girondist minister, arrived in this country and proceeded to commission officers, enlist men, and fit out privateers in aid of the Revolution; and he had also

some schemes for expeditions against Spanish colonies, which attracted little attention. His proceedings called forth Washington's proclamation of neutrality in the spring of 1793. Washington and his cabinet had a very high regard for the obligations of neutrals. They also wished to avoid embroiling our young nation in the general European war. To stop Genet's privateering schemes, it was considered important to institute criminal prosecutions.

It was then the generally received opinion that the Federal courts had, to a certain extent, common law criminal jurisdiction; that the "law of nations" was a part of the Federal common law; that, treaties being part of the law of the land, their provisions in regard to neutrality could be enforced by criminal proceedings without the aid of legislation; and that therefore, although no statutes had been enacted for this purpose, an indictment would lie in the Federal courts at common law for violations of neutrality.

Chief Justice Jay so charged the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56); and upon the trial of Gideon Henfield at Philadelphia, in July of that year, Justices Wilson and Iredell and Judge Peters gave their "joint and unanimous opinion" sustaining this view (id., 66, 84). Randolph, who, as Attorney-General, conducted the prosecution, had given his official opinion to the same effect, and Secretary Jefferson concurred in it (id., pp. 88, 89). It also seems to have received the support of Hamilton, who took an active interest in the prosecution (id., p. 83).

It was, however, strenuously opposed by the prisoner's eminent counsel, Messrs. Duponcean, Ingersoll, and Sergeant; and there was political agitation against the doctrine. (2 Marshall's Washington, pp. 273–274.) Henfield was acquitted; and immediately thereafter President Washington, in consulting his cabinet as to the advisability of calling an extra session of Congress, assigned this verdict as his first reason for favoring that step. (10 Writings of Washington, Sparks' Ed., p. 362.)

It has been argued that, since Genet's performances were so closely connected historically with the enactment of the neutrality laws, therefore these laws should be construed as aimed particularly at those violations of neutrality in which he had been so notoriously engaged.

There is, however, no historical foundation for this argument, nor was the Congress of Washington's time accustomed to legislate in that way. It was evidently their intention to provide a complete code of neutrality law for the honor and protection of the nation. It is true that the judges had unanimously declared the law of nations to be enforceable, criminally as well as civilly, without further legislation. A contrary opinion, however, having been adopted by eminent counsel and by large and influential political organizations, it was thought advisable to make certain, and at the same time codify, this portion of the law, with such amendments as might be advisable for the purposes of municipal law.

This work was recommended to Congress by President Washington in his annual address on December 3, 1793. Some of the important words in the section now before

the court for its construction are to be found in this message (Annals of Congress, p. 11):

> Where individuals shall * * * enter upon *military expeditions or enterprises* within the jurisdiction of the United States * * * these offenses can not receive too early and close an attention, and require prompt and decisive remedies.

The position taken by the Administration in 1793, and confirmed by the famous act of 1794 (which is the first instance in any nation of municipal legislation in support of the obligations of neutrality) is generally recognized to have been far in advance of the general development of international law at that period. (Hall's International Law, § 213.)

As a result of the complications growing out of the South American revolutions and of the complaints made by Spain and Portugal against the assistance given to these revolutions by American citizens, the act of 1818 was passed reenacting the provisions of the act of 1794, but making them applicable to "any colony, district, or people," as well as to "any foreign prince or state."

The provision now under consideration, originally § 5 of the act of 1794, continued as § 6 of the act of 1818, is now § 5286 of the Revised Statutes, and is as follows:

> Every person who, within the territory or jurisdiction of the United States, begins, *or* sets on foot, *or* provides *or prepares the means for*, any *military* expedition *or enterprise*, *to be carried on from thence* against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, shall be

> deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

No substantial change has been made in this section since 1818; and the only amendment made in that year besides the one already mentioned was the fixing of the pecuniary penalty of $3,000 instead of leaving it, as in the act of 1794, "at the discretion of the court in which the conviction shall be had."

It is scarcely necessary to enlarge upon the public importance of the neutrality laws, but we take the liberty of submitting three quotations on the subject.

Before the enactment of the first of these laws, and during the Genet controversy, Secretary Jefferson wrote to Gouverneur Morris, then minister to France, as follows (3 Wharton's International Law Digest, 2nd ed., pp. 549–50):

> If I might venture to reason a little formally, without being charged with running into subtleties and aphorisms, I would say that if one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war by the authority of its individual citizens. But this is not true either on the general principles of society or by our Constitution, which gives that power to Congress alone and not to the citizens individually. Then, the first position was not true, and no citizen has a right to go to war of his own authority; and for what he does without right he ought to be punished. Indeed, nothing can be more obviously absurd than to say that all the citizens may be at war and yet the nation at peace.

Mr. Justice McLean, in his charge to the grand jury with relation to the filibustering expeditions in aid of the Canadian insurrection of 1837-8, said (2 McLean, 1, 6-7):

> A government is justly held responsible for the acts of its citizens. And if this government be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable, and declare war against it. Every citizen is, therefore, bound by the regard he has for his country, by his reverence for its laws, and by the calamitous consequences of war, to exert his influence in suppressing the unlawful enterprises of our citizens against any foreign and friendly power.
>
> History affords no example of a nation or people that uniformly took part in the internal commotions of other governments which did not bring down ruin upon themselves. These pregnant examples should guard us against a similar policy, which must lead to a similar result.
>
> In every community will be found a floating mass of adventurers ready to embrace any cause, and to hazard any consequences which shall be likely to make their condition better; and, it is believed, that a large portion of our citizens, who have been engaged in military enterprises against Canada, are of this description.
>
> That many patriotic and honorable men were at first induced by their sympathies to countenance the movement, if not to aid it, is probable. But when these individuals found that this course was forbidden by the laws of their country, and by its highest interests, they retraced their steps; but it is believed that there are many who persevere in their course in defiance of the law and the interests

of their country. Such individuals might be induced to turn their arms against their own government under circumstances favorable to their success.

These violators of the law should not escape with impunity. The aid of every good citizen will be given to arrest them in their progress and bring them to justice. They show themselves to be enemies of their country by trampling under foot its laws, compromising its honor, and involving it in the most serious embarrassment with a foreign and friendly nation. It is, indeed, lamentable to reflect that such men under such circumstances may hazard the peace of the country.

If they were to come out in array against their own Government the consequences to it would be far less serious. In such an effort they could not involve it in much bloodshed, or in a heavy expenditure; nor would its commerce and general business be materially injured. But a war with a powerful nation, with whom we have the most extensive relations, commercial and social, would bring down upon our country the heaviest calamity. It would dry up the sources of its prosperity and deluge it in blood.

The great principles of our republican institutions can not be propagated by the sword. This can be done by moral force and not physical.

President Monroe, in his annual message of December 7, 1819, after speaking of the wars of independence in South America, said:

This contest has from its commencement been very interesting to other powers, and to none more so than to the United States. A virtuous people may and will confine themselves within the limits of a strict neutrality; but it is not in their power

> to behold a conflict so vitally important to their neighbors without the sensibility and sympathy which naturally belong to such a case. It has been the steady purpose of this Government to prevent that feeling leading to excess. * * * It is of the highest importance to our national character and indispensable to the morality of our citizens that all violations of our neutrality should be prevented. No door should be left open for the evasion of our laws; no opportunity afforded to any who may be disposed to take advantage of it to compromit the interest or the honor of the nation. It is submitted, therefore, to the consideration of Congress, whether it may not be advisable to revise the laws with a view to this desirable result.

It is worthy of remark that our neutrality legislation, substantially in its present form, received the signature of President Monroe. It is a part of the system of policy which bears his name. He held that European powers should not be allowed further to extend their jurisdiction in this hemisphere. He believed, however, that the United States and its citizens should abstain from interference, upon either side, in revolutions of American colonies against their European mother countries. Hence, when citizens of the United States attempted to violate the rules of neutrality in aid of the revolutions which ended later in the independence of so many South American republics, he not only maintained the existing laws, but threw the influence of his Administration in favor of their amendment, so as to make them more clearly applicable.

It is sometimes forgotten that the so-called neutrality laws act upon both parties to such contests. While the

Cubans, on the one hand, can not use our country as a source of military expeditions, Spain, on the other hand, can neither enlist volunteers in this country nor procure persons to leave it for the purpose of enlisting, without subjecting her agents to the penalties of our criminal code. (Rev. St., § 5282.)

Mr. Phillips, in his brief for plaintiffs in error, says that till the Cubans' belligerency shall be recognized, "there is nothing to prevent Spain from fitting out and sending a military expedition to Cuba to put down the rebellion, provided there is no violation of the law as to enlistment." He thus raises the claim that the words "district or people," in § 5286, do not apply to a body like the Cuban revolutionists. This is an undecided question, not material to the present case. A somewhat similar question was raised in this court by the application for a writ of certiorari in *The Itata*, 149 U. S., 789. The application was dismissed without prejudice, as premature, and for reasons not involving the merits of the legal controversy was not renewed.

TRUE CONSTRUCTION OF STATUTE.

The statute is, indeed, penal, but is nevertheless not to be construed with a strictness in violation of its plain meaning and intent. The authorities to this effect are clear, and are set forth in the recent opinion of this court in the criminal case of *United States* v. *Lacher*, 134 U. S., 624, 628–9. Among them is the opinion of Bramwell, B., in *Attorney-General* v. *Sillem*, 2 Hurl. & Colt., 532, a prosecution under the British Foreign Enlistment

Act of 1819, which was founded upon our own Neutrality Act of 1818. (See also *The Itata*, 56 Fed. Rep., 505, 511.)

Little, if any, aid is to be found in international law. The words "expedition" and "enterprise" do not seem to be taken from books upon that department of jurisprudence, and the principles governing the rights of neutrals were, in 1794, in a state of transition. It had been not merely allowable, but customary, for neutrals to furnish organized armies to belligerents, under treaty provisions, as in the well known cases of the Swiss in France and the Hessians in the American Revolution. As late as 1788, during the war between Russia and Sweden, Denmark furnished assistance to Russia, while declaring itself to be in amity with Sweden; and during the same year, Holland made treaties for the purpose of securing mercenaries from the small German states. (Hall's International Law, § 211, 215; see also 2 Twiss' Law of Nations, §§ 223–225, quoting 7 Op., 367.) The views of Washington and Jefferson, as already stated, were in advance of their time, and are, indeed, considered in some respects in advance of our own time; moreover, it may be advisable, from mere precaution, for a neutral government to enact preventive legislation, beyond the international obligations of neutrality. (See 2 Wharton Crim. Law, 10th ed., § 1901.) The meaning, therefore, of the statute as enacted and approved must be found in the statute itself.

Question presented.—The main question presented by the assignments of error in the present case is a narrow

one; namely, the meaning of the phrase, "military expedition or enterprise."

It may be objected that while the statute speaks of a military expedition *or* enterprise, the indictment speaks of a military expedition *and* enterprise; and that the indictment also charges that defendants did "begin, set on foot, *and* provide *and* prepare the means for" the same. This was not in any way noticed by counsel (See fifth, tenth, eleventh, and thirteenth requests to charge, pp. 34–36); or by the court (pp. 36–37). The judge charged that defendants did not begin or set on foot the expedition, but might be convicted of providing the means for it. Whatever remedy defendants might have had at the trial, by motion to compel an election or otherwise, they can not now raise the point that they were accused, in the same count, of crimes which it was not claimed at the trial that they had committed, as well as of those which they did commit. The general verdict of guilty is applicable to each accusation (*Ballew* v. *United States*, 160 U. S., 187, 197), and therefore should be applied to the one as to which evidence was introduced. (Compare *Goode* v. *United States*, 159 U. S., 663, 669.)

Hence we shall assume, as everybody assumed at the trial, that the jury had the right to find a verdict of guilty, if anyone of the offences mentioned in the statute, and charged in the indictment, was proved beyond reasonable doubt.

(*a*) The important verbs and nouns in this section are in the disjunctive. It is, therefore, sufficient to prove that defendant has prepared the means for a military

enterprise to be carried on from here against the territory of any foreign prince. (Compare *United States* v. *Quincy*, 6 Pet., 445, 464.)

(*b*) There can be no serious question in this case as to the meaning of the statutory phrase "prepares the means for." If the trip of the filibusters from New York Harbor to Cuba was a military expedition or enterprise, within the meaning of the statute, then there can be no doubt that there was ample evidence before the jury tending to show that the officers of the *Horsa* were concerned in preparing means for it, namely, means of transportation.

Mr. Justice McLean in his charge to the grand jury (2 McLean, at pp. 2–3) makes the following remarks upon this clause of the statute:

> To "provide or prepare the means for any military expedition or enterprise," within the law, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort and maintenance of those who are engaged in it, is considered to be in violation of the law.

In the unreported case of *United States* v. *O'Sullivan* (2 Whart. Am. Crim. Law, fifth ed., § 2802, *note*) Judge Judson, in the United States district court for the southern district of New York, made the following remarks upon the same subject, which are approved by Judge Leavitt in *United States* v. *Lumsden*, 1 Bond, 5, 12:

> As an illustration of what has been said thus far I will remark that to purchase, charter, repair, or

fit up any vessel or steamboat; to procure and put on board such vessel or steamboat powder, ball, fire-arms, military stores, ship stores, or any of them, to be used at any place in contravention of and with an intent to violate this act, is proper evidence; to enlist, engage verbally, or contract with men, as officers, soldiers, or musicians, to go out on such an expedition as I have defined may be considered by the jury as providing and procuring the means of a military expedition and enterprise; and if the proof shows the additional fact that these means were provided and procured for a military expedition or enterprise, then it is your business to consider such acts as falling directly within this law.

(*c*) There is no serious question as to the meaning of the statutory phrase "carried on from thence," which was involved in *United States* v. *Rand*, 17 Fed. Rep., 142; *The Mary N. Hogan*, 18 id., 529; *United States* v. *214 Boxes of Arms*, 20 id., 50; and *United States* v. *Trumbull*, 48 id., 99. If this was a military expedition or enterprise, it was certainly carried on from the United States. The fact that the men and arms were collected in New York or vicinity, while the means of transportation were obtained in Philadelphia, is clearly immaterial.

(*d*) It is unnecessary to analyze closely even the meaning of the word "expedition." The statute uses in the disjunctive the words "expedition *or* enterprise." The distinction between these words was recognized in the famous indictments of Aaron Burr (2 Burr's Trials, 538), Smith and Ogden (Trial of Smith and Ogden, VI–XI), and O'Sullivan (*United States* v. *O'Sullivan*, 9 N. Y. Leg. Obs., 257, 259).

The word "enterprise" is much broader than the word "expedition," although we believe that either would cover the present case. It is contained, as already pointed out, in the carefully worded message of President Washington which called forth the act of 1794. It is well known that the British neutrality act or "Foreign Enlistment Act" of 1819 was based on our own act of 1818, as was recognized in *Attorney-General* v. *Sillem*, 2 Hurl. & Colt., 431. The British act contained no provision corresponding to the one now under consideration; but when this class of cases was provided for by Parliament in 1870, as a result of the experience of Great Britain under the act of 1819 and in connection with our civil war, it is worthy of notice that the word "enterprise" was omitted, the statute making criminal only the one who "prepares or fits out any naval or military *expedition* to proceed against the dominions of any friendly state." (Stat. 33 and 34 Vic., c. 9, § 11.) There can be no doubt that the omission was intentional and in view of the fact, which had then become matter of experience, that the demands of foreign belligerents are proportionately increased when the domestic neutrality legislation is exceptionally liberal. (See Hall's International Law, 4th ed., p. 637.)

An elementary principle requires that effect be given to every word in the statute, if fairly possible, holding none superfluous when such a construction can be avoided.

Speaking of the British Foreign Enlistment Act of 1819, in *Attorney-General* v. *Sillem*, 2 Hurl. & Colt., 431, 572, Pigott, B., says:

> And I confess I approve as applicable to this statute * * * Lord Coke's rule in Bonham's

> case, 8 Rep., 117, where he says: "The good expositor makes every sentence have its operation to suppress all the mischiefs; *he gives effect to every word in the statute;* he does not construe it so that anything should be vain and superfluous, nor makes exposition against express words."

This court, through Mr. Justice Strong, has laid down a similar principle in *Market Co.* v. *Hoffman*, 101 U. S., 112, 115, as follows:

> We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to *every word*. As early as in Bacon's Abridgement, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

So Chief Justice Shaw and Justices Putnam, Wilde, Morton, and Dewey of the supreme court of Massachusetts, in their opinion rendered to the governor at 22 Pick., 517, 573, said:

> It is a sound rule of construction that every clause and word of a statute shall be presumed to have been intended to have some force and effect.

Prior judicial construction. The paragraph under consideration has never come up for construction in this court, although it was incidentally referred to by Chief Justice Marshall in *Ex parte Bollman and Swartwout* (4 Cranch, 75, 136) as containing difficulties. The decisions of the lower courts are not entirely in accord with each other.

In *United States* v. *Pena* (69 Fed. Rep., 983, 987) Judge Wales, in his charge to the jury, assumes the words "expedition" and "enterprise" to be synonymous, and considers the statute as exacting a very high degree of organization:

> A military expedition or enterprise means a military organization of some kind, designated as infantry, cavalry, or artillery, officered and equipped or in readiness to be officered and equipped for active hostile operations.

Judge Addison Brown, of the southern district of New York, in the recent case, as yet unreported, of *United States* v. *Hart*, adopts similar views:

> It is a military expedition alone that is prohibited by section 5286. * * * What, then, is a military expedition as distinguished from a nonmilitary transportation of persons for enlistment abroad? The term "expedition" signifies a journey or voyage by a body of men for some definite purpose. There are various kinds of expeditions. We have had expeditions of exploration like Wilkes' expedition, Fremont's expedition, Greely's expedition, and Peary's expedition. And so there have been many military expeditions. We speak of Xerxes' expedition into Greece. A military expedition, therefore, is an undertaking by a body of men of a military character. There must be a body, because one or two men can not constitute an expedition. * * * The essential elements of a military body are, first, soldiers, as is indicated by the very word "military," derived from *miles*, a soldier. The fundamental idea of a military enterprise or expedition to be "carried on" from this country is that it is undertaken by soldiers or in some military service. Next

is the relation of the soldier to the commander. *It imports officers and the duty of military obedience.* Next, arms; such arms as are appropriate to the enterprise; such as will enable the body to do the military work contemplated. Next, that it shall act as a unit in a military way, i. e., as a body bound together by organization under a definite command. And finally, a military purpose, a purpose of attack or defense; a hostile purpose. * * * *It must be complete at the start, or possess all the elements of a military body.* It is sufficient if there was a combination by the men for that purpose with the agreement and the intention of the body that embarks, that it should become a military body *before reaching the scene of action.* * * * If, however, the expedition or enterprise was designed only to transport munitions of war as merchandise to Cuba, though for the use of the insurgent army, and at the same time to transport a body of men as individuals to Cuba, who wished to enlist there, and that was all, then it was not a military expedition or enterprise under this statute; it would not be so unless the men had first combined or agreed to act together as a military force, or contemplated the exercise of military force *in order to reach the insurgent army.*

In remarks prior to the charge the learned judge stated his views, as follows:

My opinion is unchanged that a mere expedition designed to land in Cuba, the individuals to enlist after they get there, which is not accompanied by any military organization before that, does not constitute a military expedition. That intention is too remote to bring it within this statute without the enterprise was military at the start, there being no present organization and no present contemplation

to employ military force before the arrival in Cuba. What they do there is another thing.

Being asked by counsel as follows:

> Do I understand your Honor to mean that this body of men as a unity, as a regiment or a squadron or a battalion, if you please, are to remain as a unit and as a unit to become part of the Cuban army?

the learned judge answered:

> I understand that a military body acts as a unity and the essence of a military body is one under military command, under the direction of an officer whom the men are bound to obey, under military discipline, and it must be contemplated that they are to act by the direction of some military officer and be bound by the sanction of military obligations.

Upon this charge the defendants were acquitted.

Judge Judson, in *United States* v. *O'Sullivan*, *supra*, distinguishes between the words "expedition" and "enterprise," and gives a much broader meaning to the word "military."

> Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military or, in other words, it must have been shown by competent proof that *the design*, *the end*, *the aim*, *and the purpose* of the expedition or enterprise was some military service, some attack or invasion of another people or country, state or colony as a military force. * * * But any expedition or enterprise in matters of commerce, or of business, of a civil nature, unattended by a design of attack, invasion or conquest, is wholly legal and is not an expedition or an enterprise within this act. * * * The term "expedition" is used to signify a march or journey

with martial or hostile intentions. The term "enterprise" means an undertaking of hazard, an arduous attempt.

The definitions of "expedition" and "enterprise" given by Judge Judson are quoted in *United States* v. *Lumsden, supra;* and his language is substantially incorporated in the charge of Judge Maxey in *United States* v. *Ybanez,* 53 Fed. Rep., 536. Judge Maxey continues (p. 538):

> This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of a military character. There may be divisions, brigades and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and, laboring under such delusion, they may enter upon the enterprise. * * * The proof must establish in your minds the fact that the expedition or enterprise was of a military character, and when the evidence shows that the end and object were hostile to or forcible against the republic of Mexico, then it would be to all intents and purposes a military expedition. * * * Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it to all intents and purposes as a military expedition or enterprise.

In *United States* v. *Hughes,* 70 Fed. Rep., 972, 975, Judge Brawley laid down the following test:

> "The uncombined elements of an expedition may leave a neutral state in company with one another,

> provided they are incapable of proximate combination into an organized whole." It would be different if the men had previously received such military training as would have rendered them fit for closely proximate employment.

The quotation is from Hall's International Law, 4th ed., p. 631; the "uncombined elements" referring to the men, arms, and ammunition.

Judge Brawley's charge in this case is unreported, but we insert a few extracts showing the position taken at the trial. It should be remarked in explanation of the instructions, that according to the testimony for the prosecution, the passengers armed themselves and drilled regularly on deck during the voyage to Cuba; and the truth of this testimony was one of the principal points litigated.

> There would be no question that a military company organized, as infantry, artillery or cavalry, with officers, arms, and equipments, would constitute such a military force that the transportation of it from within our territory or jurisdiction would come within the prohibition of this statute. The uncombined elements of such a force—that is to say, individuals not drilled or organized or capable of being put into a state of efficiency for warlike operations—would not constitute a military expedition within the meaning of this statute, and the transportation of such individuals as passengers would be legitimate commerce, such as our laws permit. * * * If they came aboard and were received as ordinary passengers in unarmed association, and were carried simply as passengers and neither before they came aboard or after they came aboard were they organized as a military company, then under

> the law as given to you the transportation of those men would not be an offense under this statute. But if after they got aboard they took the arms from the boxes, and organized into a company or organization, if they were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together, and of such drill or instruction, then from that time forth they would be a military organization or enterprise within the meaning of this statute.

The defendant was acquitted, although the proof was in most respects similar to that in the case at bar.

Judge Butler, in the case at bar, lays down the rule as follows (Rec., p. 37):

> In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say, provided themselves with the means of doing so, because the evidence here shows that the men were so provided. Whether such provision, as by arming, and so forth, is necessary need not be de-

cided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not necessary.

Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important.

Meaning of "enterprise." The definitions of "expedition" and "enterprise" given by Judge Judson, *supra*, are taken substantially from Johnson's Dictionary. The Century Dictionary gives the following:

> *Expedition:* 3. An excursion, journey, or voyage, made by a company or body of persons for a specific purpose; also such a body and its whole outfit.
>
> *Enterprise:* 1. An undertaking; something projected and attempted; particularly an undertaking of some importance or one requiring boldness, courage, or perseverance.

Webster's latest edition gives the following:

> *Expedition:* 3. An *important* enterprise implying a change of place; especially a warlike enterprise, a march or voyage with martial intentions; an excursion by a body of persons for a valuable end, as a military, naval, exploring, or scientific expedition; also the body of persons making such an excursion.
>
> *Enterprise:* 1. That which is undertaken; something attempted to be performed; a work projected which involves activity, courage, energy, and the like; a bold, arduous, or hazardous attempt; an undertaking.

In ordinary parlance, an expedition involves the idea of some considerable degree of organization. There is no such element in the idea of an enterprise; and the latter word would seem to have been added by Washington in his message of 1793, and by Congress in the following year, in order to preclude such reasoning as that which was adopted by Judge Brown in the case above quoted.

It is submitted that every definition of "enterprise" is answered by a body of men who, by whatever means, are collected together with sufficient coherence and coordination of action to board, at sea, a tug loaded with arms, travel a dozen leagues on the ocean, meet a steamer by prior arrangement, board the steamer with the arms, open the boxes and distribute the arms among themselves, and then by preconcerted methods land with the arms on the Cuban coast.

Some organizations are loose democracies, while others are modeled after the methods of despotic monarchies. In the field of politics we are familiar with every grade of organization between these limits. No one, however, would deny the name of organization to a body of men who were able to combine for the accomplishment of such results as those just described, even if they acted at every turn by common consent and no man ever surrendered his individuality to the control of any leader.

An organization journeying in this manner from New York Harbor into the West Indies is certainly an "enterprise." It remains to consider whether it is a "military" enterprise.

Meaning of "military." Judge Butler in the case at bar has followed the weight of authority; but the authorities, as has been seen, are few and not in harmony. Judge Brown has since refused to follow him, holding that an enterprise, to be military, must have something more than a military purpose; that it must be "under the direction of an officer whom the men are bound to obey under military discipline," and "bound by the sanction of military obligations." Under this definition it is clear that the modern form of filibustering is safe from the criminal law. In these days of the telegraphs and telephones the organization, equipment, and launching of a complete military expedition, such as Judge Brown had in mind, is no longer practicable without the consent of the home government. On the other hand, this form of expedition is no longer necessary. Foreign countries are now so near in point of time that loose organizations of volunteers who plan to keep together as a unit until they can reach and become absorbed in the belligerent army, are entirely practicable; and they are now, perhaps, the only surviving form of filibustering enterprise.

The word "military" has no defined legal meaning applicable to this statute, nor has it any sharp, defined meaning in the vernacular. No lexicographer would confine its application to bodies of men organized as cavalry, infantry, or artillery, under the strict discipline of modern war.

The Century Dictionary gives the following definitions:

> 1. Having the position or character of a soldier; pertaining to soldiers; suitable to, characteristic of, or performed by soldiers; soldierly.

2. Relating or pertaining to war, to the art of war, or to an armed force; adopted to or connected with a state of war; martial; warlike; belligerent.

Webster gives the following:

1. Of or pertaining to soldiers, to arms or war; belonging to, engaged in, or appropriate to the affairs of war.
2. Performed or made by soldiers.

It is respectfully submitted that an "enterprise" is military whenever, in the language of the Century Dictionary, it is "relating or pertaining to war," or "connected with a state of war;" whenever, in the language of Webster, it is "belonging to, engaged in, or appropriate to the affairs of war."

Judge Judson, in the O'Sullivan case, as above seen, makes "the design, the end, the aim, and the purpose" of the enterprise to be the turning point. Judge Maxey, in the Ybanez case, in words of similar purport, makes it "the end and object." This, it is submitted, is the correct test. An enterprise may be commercial or religious, or perhaps educational, or even sporting; or it may be military. What criterion is possible, other than the *intent* of those who are engaged in it? If this be the correct criterion, then it is not absolutely essential that the men who were banded together should be accompanied with arms when they leave the United States, although evidence on this point is important as bearing on the character of the enterprise. One agent of the belligerent power may be in the United States collecting men, while another is in Europe collecting arms. The men may come on one steamer and the arms on another. If the

men make the voyage together as a body, with intent to arm themselves on or before arrival at the seat of war, the enterprise is a military one.

For the purposes of the present case, however, it is not necessary to go to this extent. It is sufficient to apply the test given by Mr. Hall in his work on international law, and quoted by Judge Brawley in his opinion above cited. If the men, arms and ammunition appear on the same vessel, and if they are "capable of proximate combination into an organized whole," and especially if they are in fact in process of combination, the enterprise is military in every sense of the term, unless it be construed with such excessive strictness as to require the semi-organized force to be composed of *milites* in the technical sense of the word—that is, of men who have already formally enlisted in the service of one of the belligerents.

Judge Brawley has referred to an opinion of Hamilton Fish as Secretary of State during the Franco-German war of 1870. No such opinion seems ever to have been put in writing, nor have we any statement of it from American sources. The learned judge's statement seems to be based upon an informal communication to the Prussian minister, which in some way reached the ears of the English minister, and was by him communicated to the home Government. It would have been forgotten had not standard writers on international law rescued it from oblivion and given it their assent. It would appear that the Prussian minister complained of the fact that the transatlantic steamer *Lafayette* was carrying a large

cargo of arms and ammunition for sale to the French, while at the same time it was carrying about 600 French passengers, all of whom, as was generally supposed, intended to enlist in the army of their nation on arrival. These passengers, however, seem to have been all traveling as individuals without any concert of action; and they had no access to the arms and ammunition, any more than an ordinary passenger on an ocean steamer has access to any part of the cargo. Mr. Fish was asked not to arrest the men, but to stop the ship. In other words, he was asked to act under § 5283, not under § 5286. He replied that the ship seemed not to be intended for hostile purposes against North Germany, and that the arms and ammunition were articles of a legitimate commerce. It is stated that eighty-six of the men had previously been arrested on board the *Lafayette*, but discharged for lack of proof. (61 British and Foreign State Papers, p. 822.) He made no ruling as to what constitutes a "military expedition," and the test of "proximate combination" is Mr. Hall's, not his.

Had the Secretary actually ruled that the *Lafayette* carried no expedition there would be much force in the arguments supporting him.

When, however, the men and the cargo come aboard together; when the men have control of the cargo; when they are organized to the extent of acting in concert; when, whether or not they have any other leader, they are accompanied by a pilot brought by themselves and who acts as guide to their common destination; when they land themselves and their cargo together by their own physi-

cal efforts—can there then be any doubt that Mr. Fish would have considered this case to be one of a military enterprise?

It is submitted that the word "military" may be properly applicable, not only to a body of men organized or *quasi*-organized, but even to a single man. When Samson went out and slew one thousand men with the jawbone of an ass, his actions were clearly of a military character. There was little organization in John Brown's party of 22 men when it captured Harper's Ferry, but the capture was clearly the result of a military enterprise.

Had Secretary Fish refused to stop the 600 Frenchmen in 1870, this would not have been, because their exodus was non-military in character, but because it lacked sufficient combination to constitute an "enterprise" within the meaning of the statute. We have judicial authority to the effect that it is unnecessary for the purposes of the statute to show that the voyagers have control of the vessel. In *Ex parte Needham* (Pet. C. C., 487), decided in 1817, a company of ten men *en route* from Holland to join the insurgents in South America took passage as ordinary passengers on a vessel bound for St. Thomas. On being arrested they claimed that the statute did not apply to their case because they were only passengers and not in control of the vessel. This claim was overruled by Mr. Justice Washington and Judge Pennington.

Mr. Boyd, in his edition of Wheaton's International Law, § 439aa, makes the following remarks upon this point:

> It is impossible to lay down any hard and fast line separating commercial transactions in munitions

of war and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of a neutral government to exercise due diligence in ascertaining what the real character of the transaction may be. The elements of a hostile expedition are thus described by Professor Bernard: "If at the time of its departure there be the means of doing any act of war—if those means, or any of them, have been procured and put together in the neutral port—and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerents), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition." (Montague Bernard, Neutrality of Great Britain, p. 399.)

ASSIGNMENTS OF ERROR.

We now proceed briefly to consider the assignments of error *seriatim*.

I, II. The first two assignments of error relate to the admissibility of declarations of the party, during the voyage, as to their destination.

One of the prosecution's witnesses, Frederick C. Lee, engineer of the steam lighter *J. S. T. Stranahan*, testified *on cross-examination* that he had spoken "to a couple of those young fellows there, and they said they were Cubans." On redirect examination he was asked: "Q. Did they tell you where they were going?" The answer, admitted over defendant's objection, was: "They told me they were going to Cuba. They did not say what they were going to do." This question and answer

seem entirely unobjectionable in view of the cross-examination; and also absolutely without any importance, since it is an uncontroverted fact in the case that the party meant to go, and did go, to Cuba.

The witness Carl Arnston, a fireman on the *Horsa*, was asked: "Q. Did you have any talk with any of these men?" *The question* was objected to "unless it [the talk] was in the presence of these defendants." The objection was overruled and exception taken. Hence, if *any talk* between this fireman and the passengers, not in defendants' presence, might be competent, the objection was not good. The answer was: "A. Yes, sir. I was going in the forecastle one night and he told *us*, 'I go down to Cuba to fight.' Q. To fight who? A. The Spanish." There was no objection to the second question; no objection, and no motion to strike out, as to either answer. The record does not show who made these statements, or how many persons were present when they were made. It was not even brought out that the defendants were not present.

It is submitted that the exception was not sufficient. Assume, however, that the record sufficiently raises the question of admissibility of the filibusters' statements concerning the object of their voyage. Were these statements incompetent?

It should be borne in mind that a secret combination between the officers of the *Horsa* and this mysterious party had already been completely proved. The former started from Philadelphia, the latter from New York. They exchanged preconcerted signals on the

ocean; joined together for a few days' voyage; then parted on the high seas, again by preconcerted action and at dead of night. Was the secret combination thus proved a lawful combination or an unlawful conspiracy?

When a secret combination is once presumptively proved, and it remains only to ascertain its motive so as to know whether the combination is lawful or unlawful, then declarations of any one of the persons engaged in it, accompanying and explaining acts in furtherance of its object, are competent evidence against all. This rule is not confined to actions whose gist is conspiracy. It applies equally to civil and to criminal cases. (*Nudd* v. *Burrows*, 91 U. S., 426, 437–439, and cases cited; *St. Clair* v. *United States*, 154 U. S., 134, 149; *State* v. *Daubert*, 42 Mo., 239, 241; 2 Bishop Crim. Pro., § 228.)

The rule is stated as follows by Mr. Justice Field in *Lincoln* v. *Claflin* (7 Wall., 132, 139):

> The declarations of each defendant relating to the transaction under consideration were evidence against the other though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design. * * *

It is not material, however, that the declarant should be joined as codefendant with those against whom his declarations are introduced in evidence. (*Nudd* v. *Burrows*, *supra*.)

In *American Fur Co.* v. *United States*, 2 Pet., 358–365, Mr. Justice Washington said:

> We hold the law to be that where two or more persons are associated together for the same illegal purpose any act or declaration of one of the parties

> in reference to the common object and forming a part of the *res gestæ* may be given in evidence against the others.

In *People* v. *Davis*, 56 N. Y., 95, 102, 103, Grover, J., said:

> Anything said accompanying the performance of an act, explanatory thereof or showing its purpose or intention, when material, is competent as part of the act. * * * The general rule is that when sufficient proof of a conspiracy has been given to establish the fact *prima facie* in the opinion of the judge, the acts and declarations of each conspirator in the furtherance of the common object are competent evidence against them all. But to make the declaration competent it must have been made in the furtherance of the prosecution of the common object or constitute a part of the *res gestæ* of some act done for that purpose.

To the same effect we may cite *Jones* v. *Simpson*, 116 U. S., 609; *State* v. *Soper*, 16 Me., 293, 297; *Commonwealth* v. *Tivnon*, 8 Gray, 375, 381; *Colt* v. *Eves*, 12 Conn., 243, 256; *Cravy* v. *Sprague*, 12 Wend., 41, 44; *Smith* v. *National Benefit Soc.*, 123 N. Y., 85, 88–89; *State* v. *Shelledy*, 8 Iowa, 477, 486, quoted in 2 Thompson on Trials, § 2455; *United States* v. *McKee*, 3 Dill., 551, 560; 1 Phillipps on Evidence, 4th Am. ed., pp. 185, 205, and notes.

The rule is stated as follows by Mr. Bishop (Bishop's New Crim. Pro., § 1248):

> On its being shown that one or more persons were acting in concert with the defendant about the thing in question, all with a common object, declarations during its progress, by any one of the others, whether

> present or absent, may be given in evidence against the defendant; yet not declarations after the transaction is ended.

Mr. Starkie summarizes the result of the authorities as follows (Starkie on Evidence, pp. 466–8):

> An entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a question arises as to the nature and quality of that act. * * * Such evidence is also admissible, on the same principle, to show the *intention* with which the act was done, where the intention was material. * * * Indeed, wherever an entry or declaration reflects light upon, or qualifies, an act which is relevant to the matter in issue and is evidence in itself, it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act, or so connected with it as to render it part of one continuous transaction.

It is, indeed, often said by courts and text writers in stating the rule, that the declarations must be made "in furtherance of a common design." This phrase, however, is not to be understood as requiring that the declaration itself, *ex proprio vigore*, must be of such a character as to further the design. Declarations accompanying and explaining acts which are in furtherance of the design are admissible. All statements, therefore, made by any of the filibusters during the voyage are proper for the consideration of the jury, if the jury come to the conclusion that the defendants, before they sailed from Philadelphia, had become involved in the enterprise.

It is to be remarked, however, that the declarations referred to in these assignments of error were, *ex proprio*

vigore, in furtherance of the purposes of the conspiracy. It was important for the filibusters to be on terms of confidence with the crew, and to enlist their active sympathy. It appears that hope was even entertained of enlisting sympathy to the extent of gaining the aid of the crew in the fight, if there should be an attack by a Spanish gunboat. (Record, p. 20.)

The extent to which evidence of this kind is admissible is much in the discretion of the trial court. (*Clune* v. *United States*, 159 U. S., 590, 592–3.)

III. This assignment of error brings in question the correctness of Judge Butler's definition of "military expedition or enterprise." His definition has already been quoted. It will be noticed that the paragraph as set forth in the assignment of error omits the last sentence quoted by us, and also differs in punctuation.

In the midst of Judge Butler's definition given to the jury, three sentences are to be found which were addressed to counsel, not to the jury, and which state what the learned judge's opinion would be, if there had been no evidence that the voyagers had provided themselves with arms and ammunition. We have argued that the opinion so stated would have been correct, if given in the form of instruction to the jury. It was not so given, however; was not material in view of the facts of the case; and need not therefore be considered.

The correctness of the learned judge's definition we shall not here discuss, as it coincides with our own views as already fully set forth. He instructed the jury that to constitute a military expedition there must be combina-

tion, organization, and a provision of arms and ammunition. He also, in the last sentence of his definition (the one omitted in the assignment of error), recognized the distinction taken by Mr. Hall and approved by Judge Brawley, as already set forth.

The exception upon which this assignment is attempted to be based is as follows (p. 41):

> Counsel for defendants except to that part of the charge of the court giving the definition of a military expedition.

It is submitted that this exception is not sufficiently specific. (*Thiede* v. *Utah*, 159 U. S., 510, 521.)

IV. This and the seven following assignments of error are based upon the following exceptions (p 41):

> To the refusal of the court to read the points that were not read to the jury.
>
> To the refusal of the court to affirm all the points without qualification.
>
> To the refusal of the court to affirm each point without qualification.

These are all insufficient. (*Thiede* v. *Utah*, *supra*.) We shall consider the assignments, however, separately.

The instruction here requested by the defendants was properly qualified by the court. As drawn by the defendants, it would make every conceivable military expedition lawful.

V. See IV, *supra*. The instruction here asked by defendants was entirely inapplicable to the case, and covered matters upon which the court had already fully charged.

VI, VII. See IV, *supra*. The instructions here requested, if our argument as to the true construction of the statute be correct, were erroneous as requiring organization in the form of cavalry, infantry, or artillery, officered and equipped for active hostile operations.

VIII. The instructions here asked are subject to the same criticisms as made in IV, *supra*.

IX, X. See IV, *supra*. The instructions here asked are subject to the same criticisms already made in VI, VII, *supra*.

XI. This assignment of error raises the jurisdictional question. It is based on the following exception (p. 42):

> To the statement of the court that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the three-mile limit, that constituted an offense against the laws of the United States.

It will be remembered that the crime is *preparing the means* for an unlawful military enterprise.

The court charged as follows with relation to the actions of the defendants (pp. 38–41):

> If * * * the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they can not be convicted.
>
> If, however, they entered into an arrangement *here* [Philadelphia] to furnish and provide the means of

transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat. * * * To convict the defendants it is necessary that the Government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that defendants *when they started* knew it. Otherwise they are not guilty. * * *

You must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation *when they left Philadelphia* or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country. The question, therefore, is: Did the defendants understand they were to carry this expedition, and had provided for it and understand what the expedition was before leaving *here* [Philadelphia]? * * * You, * * * from all the evidence must determine whether the defendants left *here* [Philadelphia] with knowledge of and provision for what they were about to do.

I now submit the case to you, reminding you of its importance.

Thus the court, in very clear language, frequently repeated, impressed upon the jury that, although the expedition or enterprise were a military one, nevertheless the defendants were not criminally responsible unless they were aware of its nature before they sailed from Philadelphia. The court did, indeed, once state that they were responsible if they knew of it before they got

outside the "three-mile limit;" but this remark was not applicable to the facts in the case, was apparently not noticed by counsel, was not excepted to, and would in any case be immaterial, there being no question of *venue* raised as between Pennsylvania and New Jersey.

The military expedition or enterprise started, indeed, in the southern district of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States, since the *Horsa* was a foreign vessel. Nevertheless, the *Horsa's* preparation for sailing, and the taking aboard of the two boats at Philadelphia, constituted a preparation of means for the unlawful expedition or enterprise. The means thus prepared were not only important, but essential. Without them the filibusters could not have reached their destination. That the *Horsa* and its officers were foreign (assuming that the mates as well as the captain are foreigners) is immaterial. They committed a statutory crime upon American soil; and having committed it in the eastern district of Pennsylvania, they were properly indicted and tried in that district.

XII. This assignment of error is based upon three exceptions.

The first exception is as follows (p. 41):

> To the statement of the court that the men were armed.

This exception seems to be based upon a fundamental misconception of the nature of a writ of error. Upon such a writ the appellate tribunal can consider only errors of law, not errors of fact. Whether or not the

men were armed is a question of fact. It was stated by the court as a fact, and not as a conclusion of law. Even, therefore, if the statement had been a mistake, it would not be the proper basis of an exception. From the numerous authorities we may cite *Carver* v. *Astor*, 4 Pet., 1, 3; *Mitchell* v. *Harmony*, 13 How., 115; *Vicksburg, &c., R. R. Co.* v. *Putnam*, 118 U. S., 545, 553; *Baltimore, &c., R. R.* v. *Fifth Baptist Church*, 137 U. S., 568, 574.

The statement, however, was based on uncontradicted testimony. The prosecution's testimony to the effect that the men were all armed with rifles was not directly contradicted; and it was admitted by everybody that the men all had *machetes*, which, as already shown, are weapons of war as well as of peace, and which could have had no possible peaceful use upon a vessel at sea.

The other exceptions relate to the court's statement that "if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all, as to the nature of their expedition." This has already been discussed. (I, II, *supra*.)

XIII. This assignment is based upon the following exception (p. 41):

> To the statement of the court that in its opinion this was a military expedition.

The court's statement in full is as follows (p. 39):

> That this was a military expedition, designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one *for your determination*

> *alone*, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only.
>
> If you find that this was not a military expedition, or, rather, if you are not *fully satisfied* that it was, your verdict will be for the defendant without going further.

This seems to perform the functions of the court, without trespassing upon the province of the jury, within the many decisions of this court, among which we need cite only *Simmons* v. *United States*, 142 U. S., 148, 155. In that case the trial judge had charged the jury "that he regarded the testimony as convincing," having already "told them in so many words that the facts were to be decided by the jury and not by the court." This court, speaking by Mr. Justice Gray, approved the instruction.

XIV. This assignment has already been discussed under XI, *supra*.

XV. This assignment of error is based upon no exception. There can be no question that the trial judge properly submitted to the jury the question of Captain Wiborg's veracity in stating that he was ignorant of the service required of him until he reached the point near Barnegat. Not only was the captain an interested party, but his own testimony disclosed grave doubt of his veracity, as in his claim that the proceedings did not appear to himself to be unusual (p. 29); in his failure to produce the charter-party and alleged sailing orders upon which he pretended to rely (pp. 26–7, 29); and in his prevarication to the collector at Port Antonio (pp. 21, 32, 33).

An assignment of error without an exception will not be considered. (*Tucker* v. *United States*, 151 U. S., 164, 170; *St. Clair* v. *United States*, 154 U. S., 134, 153.)

XVI. This assignment also is founded upon no exception. It is proper for the trial judge in charging the jury to speak of the importance of enforcing penal laws with the reasons therefor. (See 2 Thompson on Trials, § 2456.)

XVII, XVIII. The jurisdictional point raised by the motion in arrest of judgment has been already discussed. (XI, *supra*.)

The prisoners failed on the trial to move for a direction to acquit. They now apparently endeavor to remedy the omission by means of a motion in arrest of judgment. This they can not do, because the bill of exceptions is not before the court upon such a motion. (1 Bishop's New Crim. Pro., § 1285.)

There was, however, before the jury, not merely some evidence, but most cogent and convincing evidence, that the *Horsa* expedition was military in character. Very possibly the filibusters intended to separate when they reached headquarters, and become merged as individuals in the insurgent army. But they most clearly intended, until that time, to stand together and defend themselves with arms if necessary.

The remaining exceptions seem to need no notice.